Supreme Court, U.S.
FILED
FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1442

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

MAX J. ALLEN,
PETITIONER,

v.

LINWOOD H. SNOW,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

RONALD F. KEHOE,
BARBARA BRUCE WILLIAMS,
HAUSSERMANN, DAVISON & SHATTUCK,
One Boston Place,
Boston, Massachusetts 02108.
(617) 723-2920

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Whether the court below applied correct constitutional standards in holding that petitioner had not been denied effective assistance of counsel when trial counsel was intimidated by the trial judge into ceasing actions which counsel, in the exercise of his professional judgment, deemed necessary in defending the petitioner?

2. Did the highly prejudicial questions asked by the prosecutor in cross-examination of a defense witness, and for which he had no foundation, deprive the petitioner of his right to a fair trial under the Due Process Clause?

3. Did the charge to the jury on the issue of the credibility of the State's primary witness, a named co-conspirator who had plea bargained with the State and who was not tried with defendant, deny petitioner due process or his Sixth Amendment right to confrontation, or both?

Table of Contents.

Opinions below 1

Jurisdiction 2

Constitutional provisions involved 2

Sixth Amendment 2

Fourteenth Amendment 2

Section 1 2

Statement of the case 3

Statement of facts 5

Basis for federal jurisdiction in the court of first instance 8

Reasons for granting the writ 8

I. This Court should determine what is the applicable standard for evaluating whether the petitioner was denied effective assistance of counsel when trial counsel was intimidated by the trial judge into ceasing actions which counsel, in the exercise of his professional judgment, deemed necessary in defending the petitioner 8

II. The ruling by the Court of Appeals, that the prosecutor's cross-examination of a defense witness through questions for which he had no basis in fact and by which he apparently intended to make a prejudicial suggestion to the jury was consistent with due process, is in conflict with the spirit of rulings by this court which condemn such prosecutorial overreaching 11

III. The Court of Appeals' refusal to interpret the jury charge as possibly misleading to the jury is inconsistent with this Court's ruling in Sandstrom v. Montana, 442 U.S. 510 (1979) 15

If the jury misunderstood that it could not consider the plea bargain in evaluating the credibility of a key government witness, then the petitioner's Sixth Amendment right of confrontation and his right to due process were violated 17

1. The right of confrontation 17

2. Due process rights 18

Conclusion 19

Appendix A 1a

Appendix B 7a

Appendix C 18a

Appendix D 40a

Table of Authorities Cited.

Cases.

Brady v. Maryland, 373 U.S. 83 (1963) 13, 14

Brown v. Estelle, 468 F.Supp. 42 (N.D. Tex. 1978), aff'd, 591 F.2d 1207 (5th Cir. 1979) 14

Commonwealth v. Allen, Mass. Adv. Sh. (1980) 175, 400 N.E.2d 299 1

Cool v. U.S., 409 U.S. 100 (1972) 16, 18

Davis v. Alaska, 415 U.S. 308 (1974) 17

Douglas v. Alabama, 380 U.S. 415 (1965) 13

Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978) 18

Geders v. U.S., 425 U.S. 80 (1976) 11

Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975) 13, 14

Holloway v. Arkansas, 435 U.S. 475 (1978) 11

Imbler v. Craven, 298 F.Supp. 795 (1969), aff'd, 424 F.2d 631 (1970), cert. denied sub nom., California v. Imbler, 400 U.S. 865 (1970) 13

In re Winship, 397 U.S. 358 (1970) 18

Miller v. Pate, 386 U.S. 1 (1967) 13

Mooney v. Holohan, 294 U.S. 103 (1934) 13

Moynahan v. Manson, 419 F.Supp. 1139 (D. Conn. 1976) 13, 14

Napue v. Illinois, 360 U.S. 264 (1959) 13

Pointer v. Texas, 380 U.S. 400 (1965) 14, 17

Salemme v. Ristaino, 587 F.2d 81 (1st Cir. 1978) 12

Sandstrom v. Montana, 442 U.S. 510 (1979) 15, 16, 17

Strauss v. U.S., 376 F.2d 416 (5th Cir. 1967) 18

U.S. v. Duklewski, 567 F.2d 255 (4th Cir. 1977) 9, 10

U.S. v. Freeman, 519 F.2d 67 (9th Cir. 1975) 10

U.S. v. Hurt, 543 F.2d 162 (D.C. Cir. 1976) 10

U.S. v. Stulga, 531 F.2d 1377 (6th Cir. 1976) 16

Williams v. Henderson, 451 F.Supp. 328 (E.D. N.Y. 1978), aff'd, 584 F.2d 974 (1978), cert. denied sub nom., Solberg v. Henderson, 441 U.S. 911 (1979) 14

Zemina v. Solem, 438 F.Supp. 455 (D. S.D. 1977), aff'd, 573 F.2d 1027 (8th Cir. 1978) 18

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution

Fifth Amendment 14

Sixth Amendment 2, 3, 5, 12, 14

Fourteenth Amendment, Section 1 (Due Process Clause) 2, 5

28 U.S.C.
§ 1254(1) 2
§ 2254(a) 8
Massachusetts General Laws c. 233, § 201 7n

MISCELLANEOUS.

ABA Standard, Prosecution Function, § 5.7(d) 14n

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

MAX J. ALLEN,
PETITIONER,

v.

LINWOOD H. SNOW,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit, not yet reported, appears in the Appendix attached hereto (App. A at 1a-6a). The opinion of the District Court for the District of Massachusetts (App. B at 7a-17a) is reported at 489 F.Supp. 668 (D. Mass. 1980). The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (App. C at 18a-39a) is reported at Mass. Adv. Sh. (1980) 175, 400 N.E.2d 299.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment.

Section 1.

nor shall any State deprive any person of life, liberty, or property, without due process of law . . ..

Statement of the Case.

On October 13, 1977, the Suffolk County (Massachusetts) grand jury indicted Max J. Allen, Michael R. Cappiello, Martin Koplow, and George Lincoln for conspiring to burn a building at 50 Symphony Road in Boston and for conspiring to defraud the insurer of that building. These crimes were alleged to have been committed between February 1, and August 8, 1975.

The case was tried before Judge Dwyer in September, 1978 and the jury convicted defendants Allen, Cappiello, and Koplow. Lincoln, who was the State's chief witness in this case as well as in other "arson ring" cases which were specially assigned to Judge Dwyer, was not tried with the other defendants. Lincoln pleaded guilty approximately a year following the convictions of defendants Allen, Cappiello, and Koplow pursuant to his plea bargaining agreement with the State.

On appeal, defendants Allen, Cappiello, and Koplow raised three issues of constitutional magnitude which, upon affirmance of the convictions by the Supreme Judicial Court of Massachusetts, became the grounds for their seeking federal habeas corpus relief and which are now the grounds for this petition for certiorari.

The first issue raised was that the defendants' Sixth Amendment rights to the effective assistance of counsel had been violated by the trial judge's actions, which resulted in the termination of the pretrial investigation of jury veniremen by defense counsel. The Supreme Judicial Court did not reach the constitutional issues raised because its review of the record led it to conclude that defense counsel had voluntarily abandoned the investigation, and that the judge's actions were not responsible for the termination of the investigation (App. C at 21a-29a).

When the petitions for writs of habeas corpus were filed with the district court, they were accompanied by motions for

an evidentiary hearing on the issue of whether or not defense counsel had voluntarily abandoned the investigation. Affidavits of the three defense counsel were submitted in support of these motions, which stated that each counsel had abandoned the investigation because: (1) he believed that Judge Dwyer had effectively ordered that the investigation be stopped; and (2) he was subjectively intimidated by Judge Dwyer's actions, in that he feared being placed in contempt at the end of the trial if he continued the investigation (App. D at 43a-55a). The district court denied the motions for an evidentiary hearing and dismissed the petitions on the basis that: (1) the Supreme Judicial Court's inference of voluntary abandonment of the investigation was clearly supported by the record; and (2) subjective intimidation of counsel was immaterial, because, (3) there was no constitutional right to a pretrial jury investigation which a state may entirely prohibit (App. C at 24a-27a). The Court of Appeals affirmed the district court, holding that: (1) its independent study of the record satisfied it that the trial judge did not prohibit the investigation; (2) the test of counsel's subjective reaction is not the correct one; and (3) objectively, counsel's cause for apprehension was not chargeable to any impropriety by Judge Dwyer (App. A at 3a-4a). The Court of Appeals did not reach the constitutional issues raised. *Id.*

The second issue raised was whether the prosecutor's cross-examination of a defense witness through highly prejudicial questions, for which he had no good faith basis in fact, denied the defendants a fair trial consistent with due process. While the Supreme Judicial Court, the district court and the Court of Appeals each disapproved of the questioning and doubted the prosecutor's motivation in conducting this cross-examination (App. C at 37a-38a; App. B at 14a-15a; App. A at 4a-6a), each reviewing court held that the curative instructions given must be deemed to have cured any prejudice, and that any error did

not so infuse the trial with inflammatory prejudice as to render a fair trial impossible (App. C at 37a-38a; App. B at 13a-15a; App. A at 5a-6a).

The third issue raised was whether the jury instructions given with respect to the issue of Lincoln's credibility were constitutionally sufficient under the Sixth Amendment and under the Due Process Clause. Each reviewing court held that these jury instructions were not constitutionally defective (App. C at 38a-39a; App. B at 14a-17a; App. A at 3a-5a).

Statement of Facts.

Prior to trial, defendants Allen and Cappiello moved to dismiss the indictments because of extensive pretrial publicity relating to a so-called "arson ring" of which the defendants were allegedly a part. The judge denied these motions but, in doing so, noted the extent of the publicity, and found as a fact that much of it had been intentionally generated by the office of the Attorney General, the prosecuting authority. The trial judge further noted the potential prejudice to the defendants which might arise from the widespread publicity, with respect to the charges against them as well as other "arson ring" prosecutions. The judge indicated that he would conduct an extensive voir dire examination of prospective jurors to ensure against prejudice to the defendants.

Against this background of extensive pretrial publicity, the judge ordered summonses to two special jury venires of 100 persons each for September 12 and 13, 1978, and allowed the Commonwealth's motion to sequester the jury. Against this same background, the defendants' counsel launched a neighborhood investigation of the jury veniremen, which was planned to include, but not be limited to, examination of their

neighborhoods and interviews with neighbors of the veniremen. As the jury was being empanelled from the first special venire on the morning of September 13, 1978, the prosecutor, Mr. Shaw, informed the judge of the ongoing investigation and its scope. Upon being informed of the fact of the investigation, the judge took a series of actions to which defense counsel responded. As a result of the judge's actions and the defense counsels' responses thereto, the investigation was terminated in all respects. These actions and responses are detailed in the record that is before this Court (App. C at 21a-27a).

The jury was finally empanelled and the testimony and evidence in the case was presented to the jury. The State's key witness was George Lincoln. Lincoln's testimony was that he led a double life as an above-board real estate speculator and as a contract arsonist. He testified that each of the three petitioners knowingly did business with him in selling 50 Symphony Road to him in his illegitimate capacity as part of a conspiracy to commit arson and to defraud an insurance company. Each defendant took the stand and confirmed that portion of Lincoln's testimony which indicated that the parties were engaged in a legitimate business transaction, *i.e.*, transferring a distressed property in a high risk section of Boston to a real estate speculator and contractor, who intended through his business connections to include the property as an apartment building in a 100-unit package for rehabilitation financing from the Massachusetts Housing Finance Agency. They each emphatically denied that there was any criminal intent to conspire with Lincoln either to defraud an insurance company or to commit arson.

Lincoln's version of criminal activity on the part of these petitioners was not verified by any overt acts or physical evidence of the alleged conspiracy. All of the documentary evidence substantiated the legitimate business version to which each of the petitioners testified. No witness corroborated Lin-

coln in any material respect,[1] even though his attorney, Milton Band, had been present at the closing during which each of the defendants made incriminating remarks, according to Lincoln. Band testified that he had not heard any of these incriminating remarks made during the closing.

During the trial, Lincoln testified that Koplow had admitted to him that Koplow had set fire to 50 Symphony Road sometime in February, 1975. The Commonwealth introduced evidence that a fire of incendiary origin had occurred on the premises on February 26, 1975. By way of an alibi, Koplow's wife, Rose, testified that she and her husband were at home at the time this fire was allegedly set, and that he had received a phone call from a tenant about a fire on the premises.

On cross-examination, Mr. Shaw, using a sheet of paper from which he was apparently reading the supposed dates of unrelated fires, asked Rose Koplow if she remembered receiving a call concerning a fire at her husband's property on a date outside the conspiracy period. Following defendants' objections, a bench conference was held and Mr. Shaw stated that the purpose of questions dealing with other fires was to test the witness' memory. Mr. Shaw admitted that while he had evidence of the fire, he had none with respect to a call made to the Koplow home. Over objection, Mr. Shaw asked a series of similar questions pertaining to unrelated fires at other properties on dates outside the period of the alleged conspiracy. Each question suggested vividly to the jury that a fire had occurred at Koplow's premises on those dates. At the end of this line of questioning by Mr. Shaw, the defendants moved for a mistrial, which was denied.

At the close of the evidence, the judge instructed the jury. On the critical issue of Lincoln's credibility, the judge gave only a brief instruction in the general part of his charge that in

---

[1] As to Allen only, Lincoln was corroborated on a minor aspect by one Fraine who was an immunized witness. As such, Fraine's testimony required corroboration (Massachusetts General Laws c. 233, § 201), which solely came from Lincoln.

evaluating the credibility of each witness, the impact of any personal interest that a witness has in the outcome of the case should be considered. In this general part of the charge the judge also instructed the jury that "[e]vidence is not whether or not you agree that the Commonwealth was wise or prudent to plea-bargain with Lincoln for his testimony." At the end of the charge, defense counsel argued to the judge that the jury might well have understood his charge as withdrawing the issue of Lincoln's plea bargain from their consideration of his credibility. Counsel requested the judge to cure any such misimpression either by: (1) telling the jury that it could consider the plea bargain in terms of Lincoln's motive to testify; or (2) giving an accomplice instruction. The judge declined to give any further elaboration.

Basis for Federal Jurisdiction in the Court of First Instance.

The jurisdiction of the United States District Court for the District of Massachusetts was invoked under 28 U.S.C. § 2254(a).

Reasons for Granting the Writ.

I. THIS COURT SHOULD DETERMINE WHAT IS THE APPLICABLE STANDARD FOR EVALUATING WHETHER THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL WAS INTIMIDATED BY THE TRIAL JUDGE INTO CEASING ACTIONS WHICH COUNSEL, IN THE EXERCISE OF HIS PROFESSIONAL JUDGMENT, DEEMED NECESSARY IN DEFENDING THE PETITIONER.

The essence of petitioner's argument is that when the actions of a trial judge place defense counsel in a position where

their professional and personal interests in avoiding a contempt order are in conflict with the interests of their clients in pursuing a legitimate course of action in their defense, then their clients are denied the effective assistance of counsel. *See U.S.* v. *Duklewski*, 567 F.2d 255 (4th Cir. 1977).

Petitioner requested an evidentiary hearing in the district court to show that even if the trial judge had not directly prohibited the investigation, his actions caused each of the three trial counsel to form the subjective belief that if the investigation was not terminated, he was in serious danger of being held in contempt at the end of the trial. Affidavits of these counsel were submitted in support of the motion for an evidentiary hearing. The district court denied the motion for an evidentiary hearing, holding that even if subjective intimidation of counsel were established, it would be immaterial because an accused does not have a constitutional right to conduct a jury investigation (App. B at 11a-13a).

The Court of Appeals, in affirming the district court, held that the subjective reaction of trial counsel is not the correct standard, and, objectively, counsel's cause for apprehension was only inherent in the situation, and was not chargeable to any impropriety by the trial judge (App. A at 3a-4a).

This ruling by the Court of Appeals stands as the only direct holding that the subjective reaction of counsel is the incorrect standard and that, on an objective standard, trial counsel's cause for apprehension must be the result of some impropriety by the trial judge. This Court should not allow these erroneous holdings to stand, and should take this opportunity to articulate the applicable standard for evaluating whether trial counsel has been impermissibly deterred from taking legitimate action on behalf of his client as a result of a trial judge's actions.

Petitioner urges that the standard should be that when trial counsel forms a subjective belief — which is reasonable under

the circumstances — that he will be held in contempt if he continues certain actions on behalf of his client, and he therefore ceases such actions, then the accused has been denied effective assistance of counsel. *Cf. Duklewski, supra* (counsel's expression to the judge, that "a motivating factor in his withdrawal" was actions taken by the judge which were coercive in effect, bears upon the question of whether the withdrawal was voluntary or coerced); *U.S.* v. *Hurt*, 543 F.2d 162, 166 (D.C. Cir. 1976) (counsel's subjective "feeling" that the filing of a libel suit against him put him in a conflicting position was germane to the conflict of interest question); *U.S.* v. *Freeman*, 519 F.2d 67 (9th Cir. 1975) (trial counsel who might be compelled by a contempt order to answer questions put by the trial judge would "presumably perceive" that he was under "some degree of compulsion").

Furthermore, it is immaterial whether the trial judge's actions were proper or improper. Even if a judge acts with the best of motives, if his actions have a coercive effect on counsel and thereby interfere with counsel's taking any ethical action which does not unduly interfere with the manner in which a trial is conducted, then a defendant's right to the effective assistance of counsel has been denied. *Duklewski, supra.*[2]

The standard which petitioner urges this Court to adopt is consistent with the principle that any conflict between a defendant's constitutional right to the effective assistance of

---

[2]The state law issue of whether it was ethical to conduct a pre-voir dire investigation of jury veniremen, including interviews of neighbors of jury veniremen, was clarified in the instant case (App. C at 29a-34a). The Supreme Judicial Court confirmed that under Massachusetts law, defendants have a right to conduct such investigations, which may include interviews with neighbors of jury veniremen subject to the trial court's control to ensure that there are no abuses in the course of the investigation. *Id.*

fendant's constitutional right to the effective assistance of counsel, and a trial court's concern that counsel's conduct is unethical, must be resolved in favor of the right to the assistance of counsel. *Geders* v. *U.S.*, 425 U.S. 80 (1976). Once it has been demonstrated that the petitioner was denied the effective assistance of counsel due to conflict of interest or coercion, prejudice to the petitioner is presumed. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978).

II. THE RULING BY THE COURT OF APPEALS, THAT THE PROSECUTOR'S CROSS-EXAMINATION OF A DEFENSE WITNESS THROUGH QUESTIONS FOR WHICH HE HAD NO BASIS IN FACT AND BY WHICH HE APPARENTLY INTENDED TO MAKE A PREJUDICIAL SUGGESTION TO THE JURY WAS CONSISTENT WITH DUE PROCESS, IS IN CONFLICT WITH THE SPIRIT OF RULINGS BY THIS COURT WHICH CONDEMN SUCH PROSECUTORIAL OVERREACHING.

Petitioner argued to the Massachusetts Supreme Judicial Court, to the district court, and to the Court of Appeals that the trial judge had committed reversible error in permitting the prosecutor to cross-examine Rose Koplow by asking highly prejudicial questions for which he had no factual foundation, and in refusing to grant his motions for mistrial based on those questions. Petitioner argued that in the trial of an arson conspiracy *not involving any fire*, it was highly improper to ask the questions on cross-examination for which the prosecutor had no good faith basis in fact, and where the questions suggested the involvement of only one of the three co-defendants in unrelated fires.

The Massachusetts Supreme Judicial Court, while implicitly acknowledging that this line of questioning was both improper and prejudicial to the defendants, nonetheless held that "the prejudice, if any, to the defendant must be held to have been

cured by the judge's instructions" (App. C at 37a-38a). The district court, though also suggesting disapproval of the questioning and skepticism as to its alleged purpose, determined that the questions neither trespassed upon a constitutionally protected privilege nor so pervasively prejudiced the trial as to warrant relief, and presumed that the adequately curative instructions given were followed by the jury (App. B at 13a-14a). The Court of Appeals, while admitting to be "troubled" by the issue and agreeing with the other two reviewing courts that the avowed purpose of testing the witness' memory had "all the persuasiveness of a pitcher's protestations after bean-balling the lead opposition batter," held that any such prejudice is deemed cured by instructions and that it did "not find the Massachusetts court's appraisal of the total effect of the episode, in the context of an eleven day trial, so unpersuasive that we are obliged to call the trial unconstitutionally unfair" (App. A at 4a-6a). In so holding, the Court of Appeals rejected the argument that the asking of questions without a basis in fact for the surreptitious purpose of making a prejudicial suggestion to the jury was comparable to other instances involving prosecutorial overreaching, in which this Court and other federal courts have held that the convictions were obtained in a manner inconsistent with due process or with defendants' Sixth Amendment rights to confront witnesses (App. A at 5a-6a).

Petitioner urges that it was erroneous for the Court of Appeals to apply the usual rule that when an error on an evidentiary ruling is claimed to be unconstitutional, it is incumbent upon the claimant to show that such an error, even after the giving of curative instructions, "so infuse[d] the trial with inflammatory prejudice as to render a fair trial impossible." *Salemme* v. *Ristaino*, 587 F.2d 81, 85 (1st Cir. 1978). The appropriate standard is that when a prejudicial inference is raised in the minds of the jury which is material to a finding of

guilt as a result of cross-examination by a prosecutor for which he has no basis in fact, the conviction cannot stand.

Contrary to the First Circuit's decision below, this kind of prosecutorial overreaching is analogous to other such instances where this Court and other federal courts have held that there has been a violation of due process. A state may not use false testimony of a witness where the prosecutor knows the testimony to be false. *Mooney* v. *Holohan*, 294 U.S. 103 (1934). It makes no difference whether the false testimony goes to substantive aspects of the offense, *Miller* v. *Pate*, 386 U.S. 1 (1967), the credibility of the witness, *Napue* v. *Illinois*, 360 U.S. 264 (1959), or the ultimate punishment of the accused. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Nor may the prosecutor suppress evidence favorable to the accused which has been requested by defense counsel if it is material to either guilt or punishment, irrespective of the good or bad faith of the prosecutor. *Id.*

The prohibition against misrepresentation and suppression by the prosecutor is grounded on the principle that it is inherently unfair when the prosecutor "helps shape a trial that bears heavily on defendant." *Brady, supra* at 88. A prosecutor may misshape a trial in a manner equally as unfair by creating an inference that a fact exists when, to the prosecutor's knowledge, it does not exist. *Imbler* v. *Craven*, 298 F.Supp. 795 (1969), *aff'd*, 424 F.2d 631 (1970), *cert. denied sub nom., California* v. *Imbler*, 400 U.S. 865 (1970). *Cf. Douglas* v. *Alabama*, 380 U.S. 415 (1965) (prosecutor's attempts to influence jury impermissibly by knowingly calling witness who will exercise his privilege against self-incrimination); *Moynahan* v. *Manson*, 419 F.Supp. 1139 (D. Conn. 1976) (same).

While petitioner does not allege that the action of the prosecutor in this case reached the level of conduct found objectionable in *Hilliard* v. *Williams*, 516 F.2d 1344 (6th Cir. 1975)

(prosecutor "designed" the withholding of some evidence to give a false impression), in *Brown* v. *Estelle*, 468 F.Supp. 42 (N.D. Tex. 1978), *aff'd*, 591 F.2d 1207 (5th Cir. 1979) ("new and harmful facts" introduced into the trial during argument), or in *Williams* v. *Henderson*, 451 F.Supp. 328 (E.D. N.Y.), *aff'd*, 584 F.2d 974 (2d Cir. 1978), *cert. denied sub nom.*, *Solberg* v. *Henderson*, 441 U.S. 911 (1979) (improperly intense cross-examination on an otherwise permissible subject), he does urge that the cross-examination of Rose Koplow in the instant case bears an infirmity of the same quality which has been found offensive in the cited cases.[3] The questions put to Mrs. Koplow insinuated the factual predicate that certain telephone calls had been placed, and this predicate in turn plainly implied the existence of certain fires, at other times, in other Koplow properties. *See* Opinion of the Supreme Judicial Court (App. C at 37a-38a). Such cross-examination created misleading testimony, *cf. Hilliard, supra* at 1349, through the prosecutor's unfair shaping of the trial. *Brady, supra.*

In addition, this case is analogous to those where this Court has held that the prosecution's calling of a witness who will exercise his Fifth Amendment privilege violates the accused's Sixth Amendment right to confront witnesses against him. Such practice requires reversal if the prosecution is thereby allowed to add critical weight to its case by eliciting an inference in a manner which does not allow the defendant to subject the witness to cross-examination. *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Moynahan, supra.*

The inference elicited by the cross-examination of Rose Koplow was that certain fires had occurred on other Koplow

---

[3]Such conduct clearly violates the ethical standards imposed on prosecutors. *See* ABA Standard, Prosecution Function, § 5.7(d):

> It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence.

properties outside of the conspiracy period. The further inference to be drawn was that Koplow and the people associated with him on similar properties, the alleged co-conspirator defendants, engaged in other criminal arsons. There was no more possibility of redirect examination concerning those fires outside the conspiracy period than there was of cross-examining a witness who had invoked his privilege against self-incrimination. Consequently, the conviction of the petitioner cannot stand.

III. The Court of Appeals' Refusal to Interpret the Jury Charge as Possibly Misleading to the Jury is Inconsistent with this Court's Ruling in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

In the general charge given by the trial judge on credibility, the court alerted the jury to possible biases on the part of the witnesses only by stating that the jurors should examine "whether or not a witness has a particular interest in the case . . . [and] whether or not, in your judgment, such personal interest affected that witness' credibility." However, that "bare bones" general instruction was given following the judge's initial instruction that the jury could only decide the case on the evidence, and that the *wisdom* of the Commonwealth's plea bargaining with Lincoln was not evidence.

This was the judge's only reference to the key area of the defense attorneys' attack on the credibility of Lincoln. At the end of the charge, defense counsel argued that the charge was subject to the reasonable interpretation that the jury *could not* consider the fact of plea bargaining in deciding whether or not Lincoln had any motive to testify falsely. The judge declined all requests to elaborate, clarify or give an accomplice instruction.

As the issue of Lincoln's credibility was left with the jury following the judge's charge, there are three possibilities as to how the jurors considered this vital issue: (1) they might have correctly believed that they could consider the fact of plea bargaining in assessing the credibility of Lincoln; (2) they could well have misunderstood the charge as excluding all evidence regarding plea bargaining from their consideration, and therefore deliberately did not factor this element into their evaluation of the credibility of Lincoln; or (3) the jury may have evaluated the credibility of Lincoln without any adequate guidelines on the issue of his motivation to testify in favor of the government at the expense of truth and, ultimately, of the petitioner.

When a criminal jury charge, given in a state court trial, is challenged as being inadequate or confusing, to the point of violating the defendant's constitutional rights, it is the responsibility of the federal courts to carefully review the words actually spoken to the jury, and then determine what interpretation a reasonable jury *could have* given that instruction. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). If that review convinces the federal court that the jury "*could well have been misled* by the instruction," even though it might have understood the charge correctly, the court "cannot discount the possibility that the [defendant's] jurors actually did proceed upon the basis of an erroneous interpretation of the charge." *Id.* at 517 (emphasis added). *See also Cool* v. *U.S.*, 409 U.S. 100 (1972); *U.S.* v. *Stulga*, 531 F.2d 1377, 1380 (6th Cir. 1976).

The Court of Appeals should have determined whether the possible misapprehension of the law under which the jury operated was constitutionally permissible. *Sandstrom*, 442 U.S. at 517. The possibility of jury confusion was real and was pointed out to the trial judge who refused to remedy the situation. In this context, it was error for the Court of Appeals to "discount" the possibility that the guilty verdicts were re-

turned by jurors who consciously excluded the plea bargain from their evaluation of Lincoln's credibility.

Because the Court of Appeals did not construe the charge as one which could well have misled the jury, it did not reach the issue of whether, if the jury had misunderstood the charge, the constitutional rights of the accused would have been violated. If this Court determines that the petition for certiorari should be granted on the *Sandstrom* issue, it should also address the question of whether or not constitutional rights were violated by the possible misunderstanding on the part of the jury that they could not consider the plea bargain in assessing Lincoln's credibility.

If the Jury Misunderstood that it could Not Consider the Plea Bargain in Evaluating the Credibility of a Key Government Witness, Then the Petitioner's Sixth Amendment Right of Confrontation and his Right to Due Process were Violated.

1. The Right of Confrontation.

The right of cross-examination is one of the cornerstones of criminal trial process. *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Pointer* v. *Texas*, 380 U.S. 400 (1965). In particular, a criminal defendant is constitutionally entitled to broad latitude to probe the credibility of accomplices. The trial judge in this case did not directly abridge that right by curtailing or limiting the scope of cross-examination. However, in charging the jury in a manner which possibly forbade them to consider the area of bias — plea bargaining — which had been the focal point of defense counsels' cross-examination of Lincoln, that essential right was abridged in a much more insidious and subtle way; to wit, the jury had evidence presented to it which the judge then effectively took away from it. In effect, the

trial judge directed a verdict against the petitioner on the question of whether the plea bargain had any impact on the credibility of Lincoln. *Strauss* v. *U.S.*, 376 F.2d 416, 419 (5th Cir. 1967); *Zemina* v. *Solem*, 438 F.Supp. 455, 469 (D. S.D. 1977), *aff'd*, 573 F.2d 1027 (8th Cir. 1978).

2. Due Process Rights.

In addition to abridging the right of confrontation, the charge had the effect of preventing petitioner from raising a reasonable doubt in the jurors' minds as to the credibility of Lincoln. Due process requires the prosecution to prove a defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Consistent with this basic premise of our criminal process, this Court has held that a jury may not be instructed to ignore defense testimony unless the jury believes beyond a reasonable doubt that the testimony is untrue. The Court has said such an "artificial barrier" to the consideration of the testimony reduces the government's burden of proof. *Cool* v. *U.S.*, 409 U.S. 100 (1972). The charge in this case is even more egregious because it removed the theory of the defense from the consideration of the jury altogether, rather than only raising the proscribed "artificial barrier." Clearly, when a criminal defendant is foreclosed from even raising a reasonable doubt, his due process right to a fair trial has been violated. *Dunn* v. *Perrin*, 570 F.2d 21 (1st Cir. 1978); *Zemina*, *supra* at 470.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD F. KEHOE,
BARBARA BRUCE WILLIAMS,
HAUSSERMANN, DAVISON & SHATTUCK,
One Boston Place,
Boston, Massachusetts 02108.
(617) 723-2920

Appendix A.

United States Court of Appeals

For the First Circuit.

No. 80-1304

MAX J. ALLEN ET AL.,
PLAINTIFFS-APPELLANTS,

v.

LINWOOD H. SNOW ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge.*
ALDRICH and CAMPBELL, *Circuit Judges.*

Ronald F. Kehoe and *Albert L. Hutton, Jr.*, with whom *Barbara Bruce Williams, Haussermann, Davison & Shattuck, William Madden, David A. Mills*, and *Mills & Teague* were on brief, for appellants.

Paul W. Shaw, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Stephen R. Delinsky*, Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellees.

November 25, 1980

ALDRICH, *Senior Circuit Judge.* Defendants Allen, Cappiello, Koplow and one George Lincoln were indicted in Octo-

ber, 1977 in the Massachusetts superior court for conspiring to burn a building on Symphony Road, Boston, and so to defraud an insurance company. This was part of an alleged arson ring which had received a great deal of publicity, and the defendants, other than Lincoln, who had made a plea bargaining agreement, were justly apprehensive of a tainted jury. They engaged in a joint enterprise to counter it, including dispatching investigators to determine whether the veniremen owned their homes, and the quality of their neighborhoods. The jury was to be sequestered. Two jurors were chosen the first day. The morning of the second the prosecutor informed the court that the investigation was taking place, and that it included personal interviews of neighbors. The court's response to this last was immediate and strong. Although counsel asked for, and received, a second conference after the noon recess, they agreed among themselves after the first to cancel the entire investigation and did not resume it.

Defendants' appeal from their subsequent convictions went directly to the Supreme Judicial Court, and resulted in an affirmance with an extensive opinion. *Commonwealth* v. *Allen*, 1980 Mass. A.S. 175, 400 N.E.2d 299. After painstakingly reviewing the record the court rejected defendants' claim that the trial court had ordered the cessation of the investigation, and held that counsel had abandoned it voluntarily. Defendants now seek habeas corpus, contending that the trial judge had, at least in effect, ordered the investigation stopped, and, in any event, had put counsel in such fear of contempt that their personal apprehensions conflicted with their duty to their clients, thereby depriving defendants of fair representation. Defendants offered the district court affidavits of counsel concerning their interpretation of, and reactions to, the court's remarks and requested an evidentiary hearing. These moves were both rejected and their petitions dismissed.

There are several possible reasons why the district court's action was correct. It may be said that there has been a full and fair determination of the issue by the state court, with no occasion to retry it. 28 U.S.C. § 2254(d). Secondly, it is doubtful whether, had the court in fact ordered the investigation stopped, it would have been constitutionally improper. Such an investigation could have affected the jury. *United States* v. *Barnes*, 2 Cir., 1979, 604 F.2d 121, 137-43, *cert. denied*, 48 U.S.L.W. 3678. *See also*, ABA Standards Relating to the Prosecution Function and the Defense Function, § 7.2(b) at 263 (approved draft 1971). However, we cut through to the heart of the matter: (1) our independent study of the record satisfies us that the court did not order even part of the investigation stopped; (2) the test of counsel's subjective reaction is not the correct one, and, (3) objectively, counsel's cause for apprehension was only that inherent in the situation, and was not chargeable to any impropriety by the court.

The first of these conclusions need no comment — we agree with the Massachusetts court's analysis. The second should be self-evident — the court was chargeable objectively with what counsel should reasonably feel, not with whatever counsel might choose to say afterwards.[1] Finally, and most important, one would have expected counsel to have had apprehensions even if the court had said nothing. Nor, in light of what we have already said, can we fault the court's feelings. Indeed, it might well have been subject to criticism if, when the matter was called to its attention, it had delayed expressing them until later. We add that our response might well be the same even were we to find the court's comments excessive.

---

[1] *E.g.*, we note that attorney Hutton wished to give his opinion why the trial judge acted as he did, and added that it was "of course . . . too late to try and reassemble the disbanded investigation after the second conference." We may ask why the investigation was disbanded if there was to be a second conference, or why there was a second conference if it was already too late.

Trying a case is not a parlor game — there is always a chance that a court may have an unjustified reaction. To a considerable extent counsel must be prepared to back their own conduct, and rely, if necessary, on the appellate courts.

Defendants next challenge the trial judge's statement in the course of charging the jury what was and what was not evidence, that "[e]vidence is not whether you agree that the Commonwealth was wise or prudent to plea bargain with Lincoln for his testimony. That's not evidence." Defendants argue that this removed the fact of Lincoln's plea bargain from the jury's consideration in evaluating the credibility of his testimony. We do not share this interpretation. Neither here or elsewhere was the jury told that Lincoln's status did not bear on his credibility. On the contrary, it was instructed to consider the reliability of the evidence before it, including "whether or not a witness has a particular interest in the case . . . [and] whether or not, in your judgment, such personal interest affected that witness' credibility." While this would be insufficient under our own rule with respect to accomplice testimony, *McMillen* v. *United States*, 1 Cir., 1967, 386 F.2d 29, *cert. denied*, 390 U.S. 1031, it was not constitutionally inadequate. *Cupp* v. *Naughten*, 1973, 414 U.S. 141, 146-47; *Grieco* v. *Meachum*, 1 Cir., 1976, 533 F.2d 713, 720-21, *cert. denied*, 429 U.S. 858. We are not persuaded by defendants' argument that coupling the instructions given with the court's failure to give certain others somehow produced a synergistic effect.

We have left to the last, because we are troubled by it, the cross-examination of Koplow's wife. There was evidence of an incendiary fire at Koplow's premises, and Lincoln testified that Koplow had admitted setting it. By way of an alibi, Mrs. Koplow testified that she was at home with her husband at the time this fire was allegedly set, and that he had received a call about it from one of his tenants. On cross-examination, the

prosecutor asked whether she recalled receiving a call concerning a fire at her husband's property on another date, seven months later. A bench conference was called, and defendants protested that bringing in other fires was highly prejudicial. The prosecutor gave as his purpose the testing of Mrs. Koplow's memory, viz., that she might have confused the occasions. He admitted that although he had evidence of the fire, he had none that a call was made to the Koplow home.

It is difficult to see the impeachment value of this question. If Mrs. Koplow testified to remembering such a call, it would not follow that there was none at the time of the previous fire. On the other hand, if she affirmatively recalled there was no call the second time, the prosecutor had no basis for arguing she was mistaken. Finally, post, if she had no recollection, there could be no inference of any kind. Under the circumstances, the prosecutor's disclaimer of an intent to introduce the other fires for their prejudicial effect has all the persuasiveness of a pitcher's protestations after bean-balling the lead opposition batter. It could be true, but one might doubt it. Nonetheless, over defendants' objections, the court allowed the question, and others like it concerning a number of other fires on Koplow properties. To each, Mrs. Koplow testified she had no recollection.

Had this been a federal trial we likely would, in the exercise of our supervisory power, have required the prosecutor to retry the case. This being said, it does not follow that we may do the same here. The writ of habeas corpus ordinarily will not lie solely to correct alleged errors in evidentiary rulings. *Lisenba* v. *California*, 1941, 314 U.S. 219, 228; *Salemme* v. *Ristaino*, 1 Cir., 1978, 587 F.2d 81, 85. To rise to constitutional magnitude, such an error must "so infuse the trial with inflammatory prejudice as to render a fair trial impossible." *Salemme* v. *Ristaino*, ante, 587 F.2d at 86. The Supreme Judicial Court held that any prejudice from the questions was

cured by the judge's instructions, both immediately and in his charge, that questions to which Mrs. Koplow responded she had no recollection were not evidence and were to be disregarded. Ordinarily, such instructions are deemed to cure any prejudice resulting from the jury's exposure to prior crimes or conduct of the accused.[2] *See United States* v. *Carillo*, 5 Cir., 1978, 565 F.2d 1323, 1326, *cert. denied*, 435 U.S. 955; *United States* v. *Plante*, 1 Cir., 1973, F.2d 829, 830-31, *cert. denied*, 411 U.S. 950. We do not find the Massachusetts court's appraisal of the total effect of the episode, in the context of an eleven day trial, so unpersuasive that we are obliged to call the trial unconstitutionally unfair.

Affirmed.

---

[2]We do not agree with defendants' characterization of the instructions as "garbled." In any event, if they were inadequate — or garbled — the time to complain was then, not now. Nor do we agree that this episode was comparable to the introduction of evidence known to be false. *See, e.g., Miller* v. *Pate*, 1967, 386 U.S. 1. No evidence of the other fires, false or otherwise, was introduced, and the jury was so instructed.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAX J. ALLEN
Petitioner,
v.
LINWOOD H. SNOW,
Respondent,

CIVIL ACTION
NO. 80-308-S

MICHAEL R. CAPPIELLO,
Petitioner,
v.
JOHN J. BUCKLEY,
Respondent,

CIVIL ACTION
NO. 80-312-S

MARTIN KOPLOW,
Petitioner,
v.
JOHN J. BUCKLEY,
Respondent.

CIVIL ACTION
NO. 80-316-S

MEMORANDUM AND ORDER

April 18, 1980

SKINNER, D.J.

On September 29, 1978, petitioners were convicted of conspiring to commit arson and conspiring to defraud an insurer by reason of arson, after a joint trial by jury. These convictions were affirmed by the Supreme Judicial Court of Massa-

chusetts. *Commonwealth* v. *Allen*, 400 N.E.2d 229 (Mass. 1980). Petitioners filed petitions for habeas corpus under 28 U.S.C. § 2254 on February 18, 1980, which the Attorney General of Massachusetts has moved to dismiss. In response, petitioners seek an evidentiary hearing.

Petitioners allege three Constitutional violations in support of their request for habeas corpus relief: (1) the trial judge improperly interfered with defense counsel in their investigation of prospective jurors, thereby vitiating the Sixth Amendment's guarantee of an impartial jury and effective assistance of counsel; (2) the instructions were constitutionally deficient in that no accomplice charge was given, nor was a key witness' plea bargain adequately presented to the jury, in violation of the Fourteenth Amendment; (3) the improper cross-examination of petitioner Koplow's wife was so prejudicial as to deny petitioners' right to a fair trial, due process and effective assistance of counsel.

I. *Investigation of Venire Members of Defense Counsel*

Although the facts were extensively detailed by the Supreme Judicial Court in *Commonwealth* v. *Allen*, *supra*, portions of the record crucial to my determination bear repetition. During impanelment of the jury for this highly publicized case, the Commonwealth informed the judge that investigators hired by the petitioners had been interviewing the neighbors of prospective jurors. The trial judge thereafter had a series of conferences with counsel to discuss the propriety of this practice. The judge's initial reaction was that the investigation was "extraordinarily dangerous" and "highly unethical," but he requested further information before making a ruling. After two more prospective jurors were impanelled, defense counsel requested another conference, at which time the court again

questioned the investigation, by referring to the ABA Standards Relating to the Prosecution Function and the Defense Function, § 7.2(b), at 263. The judge went on to state, however, "I'm going to leave that to your judgment. I have no position in the matter until I know what all the facts are . . . . I want to tell you this: I take an extraordinarily serious view of it."

That afternoon, counsel for Koplow requested a ruling on the matter, to which the judge responded, "I'm giving you no order now. I'm making no order for the record now. I'm making a judicial inquiry, under my authority to maintain the integrity of a jury that's about to hear a case. That's the very limitation I have right now, and until such time as my inquiry is completed, I will make no orders. When it is, I may not make any then. I may reserve them until the end of trial . . . ." The judge then expressed his desire to discover which neighborhoods had been investigated, and inquired of the seated jurors whether they were aware of any inquiry in their neighborhoods.

The final colloquy took place the following afternoon, after eleven jurors had been seated. Petitioner Koplow's counsel informed the judge that the investigation had ceased as a result of the court's questioning. This exchange followed:

> The judge: "I know you're trying to preserve some appellate right in that regard, but I don't think the record will indicate that I forbade a continuance of it, even though in the lobby you tempted me to do so. I refused to order you to stop that, so I want to make my position quite clear, too."
>
> Counsel for Allen: "Well, perhaps — I think the record is already clear, but I think it should be noted on the record, if it's not, that the Court took the position with counsel that engaging in the conduct in that regard

that counsel were so engaged in was unethical, in the Court's opinion, and it was in response to the attitude and position taken by the Court that counsel ceased the inquiry or investigation of prospective jurors to the extent that it was being done prior to that. . . ."

The judge: "Whatever I've said, I've said, and the record will show it. The record will clearly indicate there was no order for you to desist from the practice, because I understand that the position of all defense counsel is it's perfectly proper to have done what they do. . . ."

Counsel moved for a mistrial after the final juror was selected, on the basis of the court's interference with the jury investigation, which motion was denied. On appeal, the Supreme Judicial Court did not reach petitioners' constitutional claims, as it found that the trial judge did not prohibit the investigation. The court stated that counsel was uncertain of their grounds in maintaining the investigation, and in view of the judge's "heavy responsibility" to preserve the impartiality of the jury, he acted properly and cautiously. Defense counsels' strategic determination to discontinue the investigation was not based upon any judicial order, nor upon any threat of contempt, and thus the motion for mistrial was found to be properly denied. *Commonwealth* v. *Allen*, 400 N.E.2d at 236.

The Commonwealth asserts that this court is foreclosed from considering the Sixth Amendment issues presented by petitioners, under the doctrine enunciated in *Wainwright* v. *Sykes*, 433 U.S. 72 (1976), because the state court conviction was upheld on the basis of an independent and adequate state procedural ground. The Supreme Judicial Court's finding

was not based upon a matter of state procedure, however, but upon a determination of fact that operated as a condition precedent to any constitutional claim. Prior to deciding whether a prohibition or inhibition of an investigation constituted constitutional error, petitioners must show they were, in fact, prohibited or reasonably inhibited from pursuing that investigation.

Under § 2254, federal courts are obliged to accept state court findings of fact unless, *inter alia*, those findings are not adequately supported by the record. The finding of the Supreme Judicial Court that the petitioners' counsel were not ordered to stop the investigation is clearly supported by the transcript.

Petitioners argue that, even absent any prohibition of the investigation, the judge's remarks so chilled counsel's representation as to deny petitioners a fair trial, an impartial jury, and effective assistance of counsel. They assert the need for an evidentiary hearing to establish the subjective intimidation of trial counsel. Although the Supreme Judicial Court did not specifically address the effect of inhibition, rather than prohibition, of the investigation upon petitioners' rights, I see no need for an evidentiary hearing. Even if subjective intimidation of counsel were established it would not result in the grant of the writ.

It is undisputed that a criminal defendant is guaranteed an impartial jury by the Sixth Amendment and by principles of Due Process. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Irvin* v. *Dowd*, 366 U.S. 717 (1961). On the other hand, voir dire "is conducted under the supervision of the trial court, and a great deal must, of necessity, be left to its sound discretion." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); *see Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). The selection of a jury panel, while crucial to both defense and prosecution, has never been left to the unfettered control of counsel.

See Schlinsky v. *United States*, 379 F.2d 735, 738 (1st Cir. 1967).

In certain circumstances, a trial court's refusal to allow specific questions by counsel on voir dire to inquire into a potential juror's prejudices, biases, and interests has been held to violate Due Process or the "essential demands of fairness." *Aldridge* v. *United States, supra*; *Ham* v. *South Carolina*, 409 U.S. 524 (1973); *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). *But see Ristaino* v. *Ross*, 424 U.S. 589 (1976). Petitioners make no assertion that they were denied the opportunity to question the jurors, nor do they argue that the resultant jury was not an impartial one.

Petitioners' only asserted constitutional violation is the judge's inhibition of their pre-voir dire investigation, pursued in order to unearth possible areas of juror bias. Any question that could have been asked in the neighborhoods, however, could have been asked on voir dire. The trial judge's determination that out-of-court inquiry be limited, thereby respecting potential jurors' rights of privacy, does no constitutional harm to the petitioners. "It is not, after all, the prospective jurors who are on trial in the cases that come before the courts." *United States* v. *Barnes*, 604 F.2d 121, 140 (2d Cir.), *petition for cert. filed*, 48 U.S.L.W. 3179 (Aug. 17, 1979) (No. 79-261). Furthermore, counsel's role in jury selection is to ensure an impartial jury, with no concomitant right to ". . . choose a jury that fits into some mold that he believes appropriate for his case." *Schlinsky* v. *United States*, 379 F.2d at 738.

In *United States* v. *Barnes, supra*, the Second Circuit upheld the trial court's decision to withhold the names and addresses of the jurors in light of the intense pre-trial publicity, and the potential for retaliation. The court concluded that "since the court gave counsel full opportunity for intelligent exercise of

challenges by inquiring into the essentials of the case at hand, appellants were not deprived of any trial right which would require a new trial." 604 F.2d at 143. Petitioners have offered no case law warranting an extension of constitutional rights during voir dire to a pre-trial investigation. So far as appears, a state court may control pre-trial jury investigation, or prohibit it altogether, without violating any constitutional strictures, so long as voir dire protection is sufficiently preserved as to identify and disqualify the biased juror.

II. *Cross Examination of Rose Koplow.*

To rebut the prosecution's charge that petitioner Koplow had set fire to the premises in question on February 26, 1975, defense counsel called Mrs. Koplow as a witness to testify that Mr. Koplow had been at home that night, and that he had received a telephone call informing him of a fire on the subject premises. On cross-examination, the prosecutor asked Mrs. Koplow if she recalled receiving a telephone call on September 26, 1975, concerning a fire on a different property owned by her husband. The prosecutor explained at a bench conference that, while he had no evidence of any other calls, he did have evidence of other fires, and he was merely testing the memory of the witness. Over the objections of the petitioners, the prosecutor was thereafter allowed to ask the "sanitized question, "Do you recall whether or not you received a telephone call [on a certain date] with respect to a fire?" with respect to four other dates. Mrs. Koplow answered each question, "No" or "I don't know." The judge instructed the jury after the first "sanitized" question that no facts contained in the question could be considered evidence when answered, "I don't remember," "I don't know," or "No." This instruction was repeated in the general charge to the jury, specifically refer-

ring to Mrs. Koplow's testimony. After denying petitioner's motions for a mistrial, the trial judge declared that Mrs. Koplow's testimony on cross-examination would only be applicable to the case of *Commonwealth* v. *Koplow*. The Supreme Judicial Court held on appeal, that any possible prejudice to the petitioners was cured by the judge's instructions. *Commonwealth* v. *Allen*, 400 N.E.2d at 241.

A federal court acting upon a habeas petition will not ordinarily grant relief based upon alleged errors in evidentiary rulings. *Lisenba* v. *California*, 314 U.S. 219, 228 (1941); *Salemme* v. *Ristaino*, 587 F.2d 81 (1st Cir. 1978). If the state trial court's actions had such a prejudicial effect upon the jury as to render a fair trial impossible, however, habeas will lie to correct the denial of petitioners' due process rights. *Salemme* v. *Ristaino*, 587 F.2d at 86: *Vanetzian* v. *Hall*, 433 F.Supp. 960, 963 (D. Mass. 1977). The same would be true if a specific constitutional right had been jeopardized. *Morgan* v. *Hall*, 569 F.2d 1161 (1st Cir. 1978).

I cannot say that the questions propounded by the prosecutor, in the context of ten volumes of testimony, either trespassed upon a constitutionally protected privilege or so pervasively prejudiced the trial as to warrant relief. I must presume that the adequately curative instructions given were followed by the jury. *Salemme* v. *Ristaino*, 587 F.2d at 88. In view of these instructions and the relatively minor impact of the alleged prosecutorial over-reaching,[1] I find no denial of due process in the denial of petitioners' motions for a mistrial. *Grieco* v. *Meachum*, 533 F.2d 713, 721 (1st Cir.) *cert. denied sub nom. Cassesso* v. *Meachum*, 429 U.S. 858 (1976).

III. *Jury Instructions.*

Petitioners allege the final charge to the jury was constitutionally deficient with regard to the credibility of George

---

[1] I do not suggest that I approve of the type of questions asked or that I am persuaded that they were asked merely to test the witness' recollection.

Lincoln, an indicted co-conspirator who had engaged in a plea bargain with the Commonwealth. Lincoln, a conceded accomplice and critical government witness, testified as to the existence of a conspiracy with petitioners and the accomplishment of its unlawful objectives. Petitioners each testified as to the legitimate nature of the business transaction they had undertaken with Lincoln. Petitioners requested the trial judge to supplement any general credibility instructions with an "accomplice charge," and specific references to Lincoln's plea bargain, in order to highlight the question of Lincoln's testimonial reliability. While the judge declined to give an accomplice charge, he did instruct the jury to consider, in evaluating a witness' credibility, the impact of any personal interest a witness may have upon the outcome of the case. As regards the plea bargain, the judge stated that "[e]vidence is not whether or not you agree that the Commonwealth was wise or prudent to plea-bargain with Lincoln for his testimony." The general charge on credibility was carefully detailed. The Supreme Judicial Court found no error in the instructions given. *Commonwealth* v. *Allen*, 400 N.E.2d at 241-2.

Faulty jury instructions will not serve as a basis upon which a federal court may overturn a state court conviction unless the allegedly inadequate charge " . . . so infected the entire trial that the resulting conviction violates Due Process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). Habeas corpus relief has been granted in circumstances where instructions improperly shifted the burden of proof to the defendant, *see*, *e.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), or where the concept of reasonable doubt was improperly defined, *see*, *e.g.*, *Dunn* v. *Perrin*, 570 F.2d 21 (1st Cir. 1978). Petitioners here carry a heavy burden to establish that omissions or misleading statements relating to credibility alone deprived them of a fair trial. *See Grieco* v. *Meachum*, 533 F.2d at 720-1.

Each of petitioners' assertions of error standing alone do not reach constitutional magnitude. The judge's concededly correct statement that the wisdom of Lincoln's plea bargain was not evidence did not withdraw the existence of the bargain from evidence. This is not a case where a secret deal between a witness and the government was not disclosed to the jury, as in *Giglio* v. *United States*, 405 U.S. 150 (1972). *See United States* v. *Ramos Algarin*, 584 F.2d 562 (1st Cir. 1978). Defense counsel fully explored Lincoln's possible motives on cross-examination, and the judge supplemented his general credibility instructions with an instruction that a witness' "personal interest" should be a factor in the jury's consideration. In addition, the judge told the jury that Lincoln was charged as a conspirator, and so regarded by the Commonwealth. Under these circumstances, the jury had sufficient information by which to measure Lincoln's credibility.

The judge's failure to give a "close scrutiny" instruction based upon Lincoln's status as an accomplice similarly did not constitute a denial of due process. While such an instruction may be prudent, *see United States* v. *House*, 471 F.2d 886, 888 (1st Cir. 1973), it is not constitutionally required. *United States* v. *Wright*, 573 F.2d 681, 685 (1st Cir.), *cert. denied*, 436 U.S. 949 (1978); *Grieco* v. *Meachum*, 533 F.2d at 721.

In *McMillen* v. *United States*, 386 F.2d 29 (1st Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968), the First Circuit held that a failure to give a cautionary instruction as to the testimony of accomplice witnesses, when combined with a "presumption of truthfulness" instruction as to all witnesses justified reversal of the federal conviction. Although no "presumption of truthfulness" charge was given here, petitioners argue that the synergistic effect of the alleged errors in the charge similarly requires reversal. It is important to note, however, that petioners do not allege that the judge incorrectly stated the law in any instruction. In addition, in the present case, in con-

trast to *McMillen*, there was other documentary and testimonial evidence to support the convictions. After a thorough review of the entire instructions, I find that the charge did not mislead or confuse the jury. *United States* v. *DeVincent*, 546 F.2d 452 (1st Cir. 1976); *Grieco* v. *Meachum, supra*.

Accordingly, respondent's motion to dismiss is ALLOWED.

s/_____

United States District Judge

Appendix C.

COMMONWEALTH *vs.* MAX J. ALLEN & others[1]
(and a companion case).

Suffolk. September 12, 1979. — January 23, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & LIACOS, JJ.

Jury and Jurors. Practice, Criminal, Examination of jurors, Investigation of jurors, Mistrial, Sequestration of jury, Instructions to jury. *Evidence,* Cross-examination.

INDICTMENTS found and returned in the Superior Court on October 13, 1977.

The cases were tried before *Dwyer,* J.

The Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Richard A. Gargiulo for Michael R. Cappiello.

Ronald F. Kehoe for Max J. Allen.

Albert L. Hutton, Jr., for Martin Koplow.

Paul W. Shaw, Assistant Attorney General, for the Commonwealth.

QUIRICO, J. On October 13, 1977, two indictments were returned against Max J. Allen, Michael R. Cappiello, Martin Koplow and George Lincoln, each charging them with conspiring to commit a crime involving a building at 50 Symphony Road in Boston. One indictment charged them with conspiring to cause the building to be burned, and the other with conspiring to cause the building to be burned with intent to defraud and injure the insurer thereof, both indictments alleging that the crimes were committed between February 1 and August 8, 1975. Allen, Cappiello

---

[1] Michael R. Cappiello and Martin Koplow.

and Koplow (the defendants) were tried together to a jury and were convicted on both indictments on September 29, 1978. They were then sentenced to serve concurrent terms in a House of Correction and to pay fines as follows: Allen, two years and $10,000; Cappiello, two and one-half years and $10,000; and Koplow, eighteen months and $5,000.[2]

The cases are now before us on the appeals by the three defendants under G. L. c. 278, §§ 33A-33G, as the result of our removal of the cases from the Appeals Court on our own initiative. G. L. c. 211A, § 10(A). Lincoln was not tried with the defendants, but he was the principal prosecution witness against them. He later pleaded guilty pursuant to a plea bargaining arrangement.

The defendants have joined in a single brief in which they argue errors allegedly committed by the trial judge in relation to the following matters: (a) a pretrial investigation of prospective jurors conducted by investigators hired for that purpose by defense counsel, (b) the separation of members of the sequestered jury for the purpose of voting in a primary election, (c) the scope and extent of the cross-examination of Rose Koplow, the wife of one of the defendants, and (d) instructions to the jury regarding the testimony of accomplices to the alleged crimes. We hold that there was no error and therefore affirm the convictions.

We summarize the evidence to the extent necessary for our disposition of these appeals.

In 1966 the defendants Allen and Cappiello purchased the three story, twenty-nine unit apartment building at 44-50 Symphony Road as an investment. In 1968 they conveyed the property to Koplow, as trustee of a realty trust, subject to the mortgage then outstanding. Koplow was to repair the building, rent and manage it, and pay the mort-

---

[2]The judge denied a stay of execution of the sentences. Further proceedings resulted in the release of the defendants on personal recognizance on March 21, 1979, pursuant to an order by a single justice of this court. These further proceedings are described in detail in *Commonwealth* v. *Allen*, Mass. App. Ct. (1979) (Mass. App. Ct. Adv. Sh. [1979] 147), *S.C.* Mass. (1979) (Mass. Adv. Sh. [1979] 1819).

gage instalments when due. In 1972 Koplow refinanced the property which resulted in the discharge of the prior mortgages and the giving of a new one in the increased amount of $125,000. At the request of the mortgagee bank, Allen and Cappiello signed an agreement to guarantee payment of the mortgage, and they also indemnified Koplow against personal liability on the mortgage. In the several years thereafter the Symphony Road area deteriorated generally, with many apartment buildings vacant, boarded up or uninhabitable.

Koplow's building suffered damage from two fires, one on March 10, 1974, and another on February 26, 1975, at which times it was covered by fire insurance of $125,000. The insurer paid $25,132.83 as a result of the first fire and $36,904 as a result of the second fire. Certain proceeds from the fire insurance were applied to the reduction of the mortgage, leaving a principal balance of about $77,000. At this time the mortgage was in default, and nearly $7,000 was owed in back real estate taxes. The firemen found some evidence that the second fire was of incendiary origin, and there was reason to believe that the fire insurer might cancel its policy.

Cappiello started seeking buyers for the property late in 1974, and in the course of that search he met Lincoln in the spring of 1975. Lincoln testified that Cappiello told him that Koplow had set the February, 1975, fire (to collect on the fire insurance policy) but that he had not done a sufficiently thorough job. He testified further that he and Cappiello negotiated an agreement under which the defendants would convey the property to Lincoln, who would procure insurance and then burn the building to pay off the balance of the mortgage, provided the defendants would first pay off all arrears on the mortgage, taxes, and water bills to avert suspicion. For this, again according to Lincoln, he was to receive $10,000 in cash and title to the property before the fire, and he was to have the benefit of any refunds of real estate taxes in the event of abatements, and

of any excess of proceeds from the fire insurance remaining after paying off the mortgage.

The three defendants met with Lincoln and his attorney at Cappiello's law office on May 12, 1975, and, after some further negotiations, an agreement was signed providing for the sale of the Symphony Road property by Koplow to Lincoln for $108,000. Two days later the same parties again met at the same place for the passing of papers for the conveyance. Again there were further negotiations, but ultimately the transaction was closed and the property was conveyed to Lincoln. Thereafter, some disagreements arose between the parties with the result that on August 7, 1975, Lincoln, without notifying the defendants, recorded a deed transferring the property back to Koplow.

There was much additional evidence which, if believed, would tend to prove the existence of the conspiracies charged against the defendants in the two indictments in question, but it is not necessary to summarize this evidence for our decision of the limited issues argued by the defendants. However, we shall refer to additional evidence when we discuss those issues.

1. *Investigation of Venire Members by Defense Counsel.* On August 1, 1978, the judge, in anticipation of the trial of this case, ordered summonses to issue for two special venires of 100 persons each, one for September 12 and one for September 13, 1978. Empanelment of the jury began on September 13, and entailed voir dire questions in addition to those specified by G. L. c. 234, § 28. These additional questions related to media coverage of arson charges, attitudes about arson and about insurance companies, and other matters.[3] Thirteen prospective jurors were ques-

[3]Before trial, defendants Allen and Cappiello moved to dismiss the indictments because of extensive pretrial publicity relating to a so called "arson ring" of which the defendants were allegedly a part. The judge held a hearing on the motions and then denied them. In doing so he filed findings and rulings which noted the extent of the publicity and the fact that much of it had been intentionally generated by the office of the Attorney General. He further specified that he would conduct an extensive voir

tioned, and two were empanelled, the first day. Nine more were questioned, and one seated, on the morning of September 14. At the mid-morning recess, the Commonwealth informed the judge during a lobby conference that investigators for the defendants had been at work in the prospective jurors' neighborhoods, interviewing neighbors of the prospective jurors. As the ensuing and later exchanges between judge and counsel are important to our disposition of this appeal, we reproduce portions of them:

THE JUDGE: "Are the facts that he asserts substantially true?"

COUNSEL FOR CAPPIELLO: "Do we agree? Yes, your Honor."

THE JUDGE: "You have conducted interviews in the neighborhoods where the jurors were from?"

COUNSEL FOR CAPPIELLO: "Yes, your Honor."

THE JUDGE: "Don't you think that's extraordinarily dangerous?"

COUNSEL FOR CAPPIELLO: "Well, your Honor, I think that, understanding our responsibility and reviewing the statute and reading what authority granted us to exercise our discretion and — within the responsibility of the statute, we carefully made sure we never interviewed any jurors, jurors' families, relatives of any jurors, and I so represent."

THE JUDGE: "But wouldn't the juror know — couldn't the juror find out that you people were investigating her by the interviewee telling her or him?"

COUNSEL FOR CAPPIELLO: "Quite possibly."

THE JUDGE: "I think it's highly unethical. I've never heard it done before. Maybe there's precedent for it. Is there? Am I living in a fairyland? Has the law changed so much that you can go into the neighborhood of jurors and interview next-door neighbors?"

COUNSEL FOR CAPPIELLO: "I don't know if that's been done. . . ."

---

dire examination to ensure against prejudice to the defendants. The defendants in this appeal do not contest the denial of their motions to dismiss.

The judge: "You're interviewing neighbors, no?"

COUNSEL FOR CAPPIELLO: "Let me make sure — they are noting the type of neighborhood, the type of house they live in."

THE JUDGE: "That's no problem. You certainly are entitled to that. I'm talking about interviewing neighbors."

COUNSEL FOR CAPPIELLO: "I don't know that that was done, your Honor."

THE JUDGE: "That's the part that's bothering me."

At that point counsel for Koplow volunteered to have the investigator called in to court to explain what was being done. The court responded:

THE JUDGE: "Okay. We'll do that at quarter of two. I'd like some enlightenment in this area. To me — I'm not quite a novice in this field. To me — that strikes me as an extraordinarily dangerous practice. If there ha[ve] been interviews of neighbors on either side of a potential juror's home and there's the likelihood and reasonable likelihood that that would get to them themselves — 'You're being investigated by the defendants' — that can have a very inhibiting effect on somebody and create fear, but until I know more about it, we are just going to let it lay right there. . . ."

Empanelment then resumed. After two more prospective jurors were questioned, defense counsel requested a bench conference. At the bench, counsel for Koplow began by stating that the investigation wasn't his idea, but that he acquiesced in it, based partly on his thinking that "certainly the Government does similar things in investigating the background of jurors . . . ." The judge responded in the following colloquy:

THE JUDGE: "Interviewing neighbors? Never heard of it."

COUNSEL FOR KOPLOW: "Not interviewing neighbors —"

THE JUDGE: "That's the part that bothers me."

COUNSEL FOR KOPLOW: "It bothers me a little bit now that your Honor mentions it."

The judge then called the attention of counsel to the ABA Standards Relating to the Prosecution Function and the Defense Function, § 7.2 (b), at 263 (Approved Draft 1971), the commentary of which he quoted to the effect that "[e]xcept in unusual circumstances [of] necessity, [counsel] should limit his inquiry to records already in existence, rather than make contemporaneous inquiry of the potential juror's neighbors." This exchange followed:

THE JUDGE (continuing): "It's right on point, and it refers to the Code of Ethical Conduct —"

COUNSEL FOR CAPPIELLO: "I think what we're asking for the lobby conference for is because we don't want to in any way — if we're wrong, we want to so advise the Court what has been done and, as [counsel for Koplow] has said —"

COUNSEL FOR KOPLOW: "If it's wrong, we want to stop it because it's going on right now."

COUNSEL FOR CAPPIELLO: "What we have done is —"

THE JUDGE: "I'm going to leave that to your judgment. I have no position in the matter until I know what all the facts are. We will go into that, gentlemen, at quarter of two. I want to tell you this: I take an extraordinarily serious view of it."

COUNSEL FOR CAPPIELLO: "Let me advise the Court that this investigator, and the retired police officers that he has hired, ha[ve] been advised at 12:10, if he can be reached to cease until the Court hears more on this."

THE JUDGE: "Okay."

The judge then asked counsel for suggestions on how to ensure that jurors already seated had not been made aware of or affected by the investigation. All parties agreed that the seated jurors be asked if they were aware of any inquiry in their neighborhoods by the defendants. Specifically, counsel for the defendants said that they did not object to the judge's naming the defendants as the source of the inquiry, "where we were responsible for this having been done," and to "mitigat[e] any possible effect [from] it." They assured the judge that only part of the first special venire list and no more than a few on the second list had

been investigated. The empanelment process again resumed.

The investigators were not present at the start of the afternoon session for the scheduled hearing, but a lobby conference was held at the defendants' request. Counsel referred to various precedents in support of their investigation, and pointed out that the ABA standard quoted by the judge was not in force in Massachusetts, but repeated that the neighbor interviews had been conducted without the express direction of counsel, who had been "primarily interested" in the qualities of the jurors' neighborhoods. The judge expressed willingness to hear counsel on "what the proper or improper thing was to do," but reiterated that his principal concern was to ensure that the seated jurors had not been intimidated. Defense counsel then questioned the judge's authority to require defense counsel to disclose to the court information provided by their investigators. The judge offered to give defense counsel time to appeal his decision to interview the investigators, but he stated that otherwise he would proceed, and added: "I don't accept your premises or precepts of ethical standards, written or unwritten, that you're giving in this lobby conference." Discussion continued on ways to ascertain any impact of the investigation on presently seated jurors. Counsel for Koplow stated that he was troubled as to his duty to his client with respect to the investigation, and stated that the court's "indirect" ruling on the investigation had caused defense counsel "to cease as soon as we heard that your Honor felt that there might be something wrong with" the practice. He requested a ruling on the record concerning the investigation. The judge responded:

THE JUDGE: "I'm giving you no order now. I'm making no order for the record now. I'm making a judicial inquiry, under my authority to maintain the integrity of a jury that's about to hear a case. That's the very limitation I have right now, and until such time as my inquiry is completed, I will make no orders. When it is, I may not make any then. I may reserve them until the end of the trial. At any rate, my

primary problem is to protect the integrity of this jury. It's as simple as that. This may all be mooted when we hear the facts that none of the jurors that we've selected — no one's gone into their neighborhood at all."

Defense counsel then informed the court that some of the seated jurors had in fact been investigated, and offered to provide some information. The judge responded:

THE JUDGE: "All I want is from somebody who instigated this inquiry to be in a position to tell us — tell the Court what persons' neighborhoods have been investigated. That's all. I just don't want to waste time on 150 veniremen if they have only gone to 50. So, now, that's our problem." The judge and counsel then agreed that the investigators would be heard the next morning, and counsel excepted to the judge's refusal to make a ruling.

Empanelment then continued, and by the end of the day eight jurors had been empaneled. The judge then inquired of the jurors en banc whether they were aware of any inquiry in their neighborhoods, and none responded affirmatively.

No further proceedings regarding the investigation were conducted the next morning, except that three more jurors were seated, including two from the first special venire, and the judge inquired of each of the three whether they were aware of any neighborhood inquiry. All responded negatively. The first venire had then been exhausted. Prior to the afternoon session, the Commonwealth inquired whether any juror on the second list had been investigated, and was assured that none had been. Counsel for Koplow then stated that "the record should note that it was after your Honor's strong questioning of the propriety of such an investigation being made that counsel ceased continuing that conduct." This exchange followed:

THE JUDGE: "I know you're trying to preserve some appellate right in that regard, but I don't think the record will indicate that I forbade a continuance of it, even though in the lobby you tempted me to do so. I refused to order you to stop that, so I want to make my position quite clear, too."

COUNSEL FOR ALLEN: "Well, perhaps — I think the record is already clear, but I think it should be noted on the record, if it's not, that the Court took the position with counsel that engaging in the conduct in that regard that counsel were so engaged in was unethical, in the Court's opinion, and it was in response to the attitude and position taken by the Court that counsel ceased the inquiry or investigation of prospective jurors to the extent that it was being done prior to that. . . ."

THE JUDGE: "Whatever I've said, I've said, and the record will show it. The record will clearly indicate there was no order for you to desist from the practice, because I understand that the position of all defense counsel is it's perfectly proper to have done what they did do. . . ."

At the conclusion of the empanelment of the jury, counsel moved for a mistrial based on the court's interference with jury selection by inhibiting the jury investigation, which motion was denied and exceptions were taken. Finally, at the end of the trial, the judge inserted in the record copies of the special venire lists, marked to show which jurors had been the subjects of investigations and/or neighbor interviews, "[s]ince the defendants have a potential appellate question arising from the Court's action in connection with that investigation."

The defendants now claim that the various statements by the judge during the empanelment amounted to a ruling by him prohibiting the use of investigators in the jurors' neighborhoods, or at least prohibiting the interviewing of neighbors. In support of this contention they cite *Sussman* v. *Commonwealth*, Mass. , (1978),[a] a case dealing with the procedure by which an attorney must be warned before the imposition of a *summary* contempt citation, in the context of cross-examination of a witness. There is no claim or indication that defense counsel here were ever threatened with summary contempt — at best there is a pos-

---

[a] Mass. Adv. Sh. (1978) 754, 761.

sible inference that the judge may have considered the possibility of a plenary hearing on the question of contempt at the end of the trial.

We hold that the judge's actions did not amount to a prohibition of the defendants' jury investigation. While the judge made clear his disapproval of the defendants' activities, he repeatedly stated that he was leaving their course of action up to the good judgment of counsel. Counsel were thus left responsible for making the difficult decision whether to pursue a questioned course of action without the full benefit of his guidance. The judge did not, however, either expressly or impliedly order the investigation terminated. The decision to terminate the investigation was made by defense counsel. Defense counsel admitted that they had not instructed their investigators whether or not to conduct neighbor interviews. It is apparent that counsel desired information about prospective jurors' neighborhoods which could be, and which they expected would be, gleaned without such interviews. The judge could reasonably have inferred that defense counsel had not instructed the investigators in proper procedures for such interviews. When the issue was raised unexpectedly, counsel were manifestly uncertain of their factual, legal, and ethical grounds. The judge was under a "heavy responsibility," *Commonwealth* v. *Dickerson*, 372 Mass. 783, 794 (1977), to preserve the impartiality of the jury, which was already of concern due to pretrial publicity, and he responded in a manner calculated to ascertain whether this impartiality had been compromised. Defense counsel shared this concern and, accordingly, offered to discontinue *all* investigation of veniremen, although only neighbor interviews were the subject of strong questioning by the judge. On reflection, counsel returned later and sought a ruling requiring their discontinuance of the investigation, and were denied one.

Absent a ruling to the contrary from the judge, counsel were free to reconsider their positions, to weigh the advantages and disadvantages involved, and then decide whether to continue with the investigation, which they believed eth-

ically proper and helpful to their clients. They are not entitled to second guess their strategic choices on appeal. The defendants were not deprived of any right to investigate veniremen by the judge. His failure, or refusal, so to rule when they requested him to do so was not legal error, on the limited information before him at that time. The motion for mistrial based on the judge's supposed interference with the investigation was properly denied. We need not reach the defendants' claims that the purported ruling deprived them of the right to an impartial jury or to the effective assistance of counsel.

Because the preempanelment investigating of prospective jurors, which includes the interviewing of neighbors, has not previously been directly addressed by this court, we proceed to do so by way of dictum for guidance of the Bar.

The practice of permitting counsel to acquire information about prospective jurors in advance of trial, to prepare for the exercise of their challenges, is long established.[4] The statute governing challenges for cause, G. L. c. 234, § 28, allows a party to introduce, in addition to the information elicited on voir dire, "other competent evidence" in support of a challenge for cause. *Commonwealth* v. *DiStasio*, 294 Mass. 273, 280 (1936). In *Commonwealth* v. *Wong Chung*, 186 Mass. 231, 237 (1904), this court noted that parties have a responsibility to protect their rights respecting challenges for cause, and that methods of investigation other than voir dire are available for this purpose. In *Dolan* v. *Common-*

---

[4]See, e.g., 4 W. Blackstone, Commentaries 351-352 (1778), citing statutes entitling defendants in certain capital cases to the list of jury panel members before trial. Today such provisions are found in G. L. c. 277, § 66, and 18 U.S.C. § 3432 (1976). Blackstone elsewhere, in extolling the virtues of the English civil jury system, points to the practice whereby the prospective jury panel "is returned to the court upon the original [writ of] venire, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause." 3 W. Blackstone, Commentaries 355 (1778). See also *id.* at 353 (procedure for trial at nisi prius altered to give parties notice of prospective jurors).

wealth, 304 Mass. 325, 343 (1939), we approved the statement that "lawful investigation [of prospective jurors] is proper." In a series of decisions we concluded that there was no prejudice to defendants arising from police investigation, in some cases including interviewing, of veniremen before trial.[5] We note, however, that direct contact with prospective jurors and members of their families has since been prohibited to parties by statute and by rule of this court. See G. L. c. 234, §§ 24, 24A; S.J.C. Rules 3:22, DR 7-108 (A), (F), 359 Mass. 796, 826-827 (1972), and 3:22A, PF 10, DF 11, Mass. (1979).

The right to exercise peremptory challenges, provided by G. L. c. 234, § 29, has been called "one of the most important of the rights secured to the accused," *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), quoting *Pointer* v. *United States*, 151 U.S. 396, 408 (1894). In *Commonwealth* v. *Soares*, Mass. (1979),[b] we reexamined this right and prohibited its misuse to eliminate jurors solely because of their membership in discrete groups, but we preserved "a legitimate and significant role for the peremptory challenge" as a tool to "eliminate prospective jurors whose unique relationship to the particular case raises the spectre of individual bias." *Id.* at .[c]

Concomitant to the use of both peremptory challenges and challenges for cause must be the implied right to use reasonable means to gather information which will aid the parties in the intelligent exercise of challenges toward the constitutionally mandated goal of a fair and impartial jury. This right has always been subject to reasonable limitation,

---

[5] *Commonwealth* v. *Smith*, 350 Mass. 600 (1966). *Commonwealth* v. *McCann*, 325 Mass. 510 (1950). *Commonwealth* v. *Sherman*, 294 Mass. 379 (1936). *Commonwealth* v. *DiStasio*, 294 Mass. 273 (1936). *Commonwealth* v. *Millen*, 289 Mass. 441 (1935). *Commonwealth* v. *Cero*, 264 Mass. 264 (1928). See *Commonwealth* v. *Dougherty*, 343 Mass. 299 (1961) (use of probation office questionnaire to prospective jurors).

[b] Mass. Adv. Sh. (1979) 593.

[c] Mass. Adv. Sh. (1979) at 623.

by the nature of the jury system, the requirements of the speedy and efficient administration of justice, and the reasonable discretion of the trial judge to protect against abuses. It is further limited by statutes regulating the jury system, and ultimately by the jurors' right to privacy. Still, the opportunity for such pretrial investigation of veniremen has never been foreclosed, and is an inherent part of the jury system as it has developed.[6]

The most efficient and least expensive method for providing counsel with information relevant to the exercise of jury challenges would seem to be a questionnaire administered by a public official which would be completed and returned prior to or at the start of jury service.[7] Such a questionnaire, use of which may require the amendment of existing statutes,[8] could provide counsel with considerable information useful to the exercise of challenges, and might make further investigation unnecessary.[9] Such a procedure

---

[6] See note 10, *infra*.

[7] General Laws c. 234A, § 18, allows for such a questionnaire in Middlesex County, administered by the jury commissioner. In other counties the commissioner of probation prepares a "juror information form" to be completed by veniremen for use in determining qualifications for jury service. See G. L. c. 234, § 24B.

[8] General Laws c. 234, § 24, as amended through St. 1956, c. 278, provides that after a juror has received a summons for duty "no person shall, except as otherwise provided by law, question any person so summoned for the purpose of obtaining information as to his background in connection with his jury duty." General Laws c. 234, § 24A, contains a virtually identical provision. See *Commonwealth* v. *Beneficial Fin. Co.*, 360 Mass. 188, 215-219 (1971), cert. denied sub nom. *Farrell* v. *Massachusetts*, 407 U.S. 910 (1972), and sub nom. *Beneficial Fin. Co.* v. *Massachusetts*, 407 U.S. 914 (1972).

[9] In counties other than Middlesex, parties are usually provided with only the name, address, occupation and place of employment or former employment of the juror, and the occupation and place of employment of the juror's spouse. See G. L. c. 234, §§ 4, 5. In Middlesex, pursuant to c. 234A, § 18, inserted by St. 1977, c. 415, § 2, the information provided to parties is much more extensive: "The information elicited by the questionnaire shall be such information as is ordinarily raised in voir dire examinations of jurors, including the juror's name, sex, age, residence, marital status, number and ages of children, education level, occupation,

would be of particular value to poorer litigants for whom the hiring of investigators is impossible. See Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 558-563 (1975).

In instances where such information is not provided, or if the information provided is inadequate, however, parties are free to use investigators in a reasonable manner.[10] Subject to the constraints previously noted, we are aware of no rule prohibiting the interviewing of persons other than prospective jurors and members of their families as part of such an investigation. See *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F.2d 414, 430-431 (3d Cir. 1955). However, it is essential that in interviewing third parties investigators do not, by design or effect, influence, solicit, intimidate or propagandize either the persons interviewed or, indirectly, the prospective juror. The risk of this improper influence occurring may be minimized by certain precautions. First, the investigators should be persons who are not closely related or associated with a litigant or his family. Second, the investigators should, where possible, avail themselves of sources of information other than third-party interviews, if

---

employment address, spouse's occupation, spouse's employment address, previous service as a juror, present or past involvement as a party to civil or criminal litigation, spouse's present or past involvement as a party to civil or criminal litigation, relation to a police or law enforcement officer, spouse's relation to a police or law enforcement officer, and such other information as the jury commissioner deems appropriate."

[10] Regarding such investigation see generally F.X. Busch, 1 Law and Tactics in Jury Trials § 145 (1959); A.F. Ginger, Jury Selection in Criminal Trials 331-364 (June, 1977 Biennial Supp.); Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545 (1975); Heyl, Selection of the Jury, 40 Ill. B.J. 328 (1952); Okun, Investigation of Jurors by Counsel: Its Impact on the Decisional Process, 56 Geo. L.J. 839 (1968); Note, Challenging Jurors, 58 Dick. L. Rev. 384 (1954); Peremptory Challenge — Divining Rod for a Sympathetic Jury? 21 Cath. Law. 56 (1975); The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies; 49 S. Cal. L. Rev. 597 (1976); Computers and Scientific Jury Selection: A Calculated Risk, 55 U. Det. J. Urb. L. 345 (1978); ABA Standards Relating to the Prosecution Function and the Defense Function §§ 5.3(b), 7.2(b) (Approved Draft 1971); ABA Standards Relating to Trial by Jury § 2.2 (Approved Draft 1968).

such sources are likely to provide the desired data.[11] Third, ideally investigators would be employed on a mutual or cooperative basis between parties, with the resulting information available to both sides.[12] If the investigation is not being made on behalf of all parties to a particular case, the investigators should not disclose the identity of the particular party or parties for whom it is being conducted. In any event, counsel are expected to retain effective control over the activities of their investigators.

Such investigations should be conducted subject to any rules or orders of the trial court applicable thereto. The trial judge may require that the parties submit the names of the persons who will be investigators, the types of information to be sought, procedures to be followed, and questions to be asked. If abuses appear in the course of an investigation, the judge should take any steps reasonably necessary to control them.[13]

Investigation of prospective jurors is, of course, subject to the limitations of the judicial process. For example, the fact that further time for investigation is desired should not be allowed to become a tool for delaying a trial. Where an unexpected depletion of the available venire occurs, requiring

---

[11] This suggestion is less restrictive than the language of the ABA Standards Relating to the Prosecution and the Defense Function referred to by the judge in his colloquy with defense counsel. See § 5.3(b) of the Prosecution Function and § 7.2(b) of the Defense Function. Effective March 1, 1979, this court adopted S.J.C. Rule 3:22A, Mass. (1979), incorporating some, but not all, of the material included in the ABA Standards Relating to the Prosecution and the Defense Functions, and with changes in the language from that of the ABA in some respects. However, Rule 3:22A does not include any of the provisions concerning selection of jurors which are contained in ABA Prosecution Function § 5.3(b) or ABA Defense Function § 7.2(b).

[12] We are not called on to decide whether, absent this arrangement, the information generated should be discoverable under Mass. R. Crim. P. 14 (effective July 1, 1979). Cf. *Commonwealth* v. *Smith*, 350 Mass. 600, 603-604 (1966); The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies, 49 S. Cal. L. Rev. 597 (1976).

[13] Sanctions may include the remedies provided in G. L. c. 234, §§ 32, 33; c. 268, §§ 13, 13B; c. 278, § 29, as well as contempt or ethical sanctions. See *Dolan* v. *Commonwealth*, 304 Mass. 325 (1939).

a specal venire of the summoning of talesmen,[14] the opportunity for investigation may of necessity be extremely limited. Subject to such reasonable constraints, jury investigation, where desired, continues to be a permissible procedure in the preparation of cases for trial.[15]

2. *Release of Sequestered Jurors to Vote.*

The defendants claim that the judge erred in allowing nine of the jurors to separate and go unsupervised for four hours to vote in a primary election at the end of the first day of evidence in the case. The primary election was held on Tuesday, September 19, 1978. Prior to allowing the jurors to go unescorted to the various voting places involved, the judge unsuccessfully attempted to secure first, absentee ballots, and then sufficient court officers to escort each juror to the polls. The judge, before releasing the jurors, instructed them not to discuss the case or to read or listen to any publicity related thereto. The nine jurors were allowed to leave at 4 P.M. and to return to sequestration by 8 P.M. The next morning the judge polled the jury as a group as to whether any information had come to them while they were away from the other jurors which would affect their impar-

---

[14] General Laws c. 234, §§ 12, 27, 42. See generally 3 W. Blackstone, Commentaries 364-365 (1778); 4 W. Blackstone, Commentaries 354-355 (1778); *Commonwealth* v. *Knapp*, 10 Pick. 477 (1830).

[15] We believe that the procedures outlined above meet concerns expressed in various quarters regarding investigations of prospective jurors. Cf., e.g. *Sinclair* v. *United States*, 279 U.S. 749, 765 (1929) (concern over character of investigators); *Kiernan* v. *Van Schaik*, 347 F.2d 775, 780 (3d Cir. 1965) (unsupervised investigation). We note that at least one jurisdiction under unusual circumstances has drastically limited the information about jurors available to defense counsel. *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3179 (Aug. 17, 1979) (No. 79-261). We are not called upon to comment on such a course for this Commonwealth. Nor is it necessary here to discuss, although we note, the concern that overzealous investigation may represent a threat to jurors' privacy. Cf. *Salt Lake City* v. *Piepenburg*, 571 P.2d 1299, 1309-1313 (Maughan, J., dissenting) (Utah 1977); Okun, Investigation of Jurors by Counsel: Its Impact on the Decisional Process, 56 Geo. L.J. 839 (1968); Computers and Scientific Jury Selection: A Calculated Risk, 55 U. Det. J. Urb. L. 345 (1978). We rely, as did the judge, on the good judgment of counsel as the primary barrier against abuses.

tiality "to the slightest degree," and stated that he would speak privately with any juror who had received any such information. No juror responded affirmatively to the judge's inquiry.

The defendants claim that the judge abused his discretion in allowing the jurors to go to the polls unescorted, and that his instructions to the jurors were insufficient to insulate them from exposure to information prejudicial to the defendants. They point particularly to the facts found by the judge in his decision denying the defendants' motions to dismiss the indictments because of publicity relating to an alleged "arson ring" and they point also to the fact that certain law enforcement officials who were seeking renomination at that primary election had made reference to the "arson ring" in their campaign advertising.

The judge had broad discretion to determine initially whether the jurors at this trial should be sequestered, and the same discretion to determine whether some or all of them should be allowed to separate for the limited time and purpose of exercising their rights to vote. When faced with a similar situation in *Commonwealth* v. *Marshall*, 373 Mass. 65, 69-70 (1977),[d] we said: "So long as they [the jurors who were permitted to separate to vote] are scrupulously protected from outside influence and from exposure to prejudicial matter, we see no reason why jurors should be prevented from exercising one of the privileges of citizenship merely because they have undertaken the responsibility of another." What we said in that case applies equally to this one. The judge took all reasonable measures to insulate the jurors against exposure to outside influence and there is no evidence that they were exposed thereto. The burden of proving any such exposure rests on the defendants and there is nothing in the record to show that the burden was met. *Marshall, supra* at 69.[e] See *Commonwealth* v. *Fidler*,

---

[d] Mass. Adv. Sh. (1977) 1530, 1536.

[e] Mass. Adv. Sh. (1977) at 1536.

Mass. , (1979).[f] *Commonwealth* v. *Nolin*, 373 Mass. 45, 49 (1977).[g] The procedure followed by the judge in questioning the jurors collectively when they first again assembled after they had voted was in accord with that approved by this court in *Commonwealth* v. *Jackson*, Mass. , (1978).[h]

We hold that there was no abuse of discretion or other error in the judge's action in permitting nine of the jurors to go to the polls to vote, or in the steps taken by the judge in satisfying himself after their return that they had not been exposed to improper influences.

3. *Cross-Examination of Rose Koplow.*

Rose Koplow, the wife of the defendant Koplow, testified on her husband's behalf. She stated that he was at home in Randolph (about a thirty-minute drive from Boston) on the night of February 26, 1975 (when, it had been alleged, he had set a fire at 44-50 Symphony Road), and that she was present when he received a phone call that night telling him that the building was on fire.

On cross-examination the prosecutor asked Mrs. Koplow if she recalled where she was on another evening in 1975, and when she answered negatively, he asked if there hadn't been a fire at a different property owned by Koplow on that evening. After objection, the prosecutor stated at the bench that he was testing the witness's memory about other calls she received reporting fires at other properties owned by Koplow. He stated that he had evidence that the fire had occurred, but no evidence that any call was made to the Koplow home concerning it. The judge, over objection, allowed the prosecutor to ask the "sanitized" question: "Did you on or about [a certain date] at your home get a telephone call relative to a fire? Yes or no?" The prosecutor proceeded to ask such questions about four different dates, each resulting in answers of "No" or "I don't know."

---

[f] Mass. Adv. Sh. (1979) 240, 251.

[g] Mass. Adv. Sh. (1977) 1503, 1507.

[h] Mass. Adv. Sh. (1978) 3062, 3076.

Questions concerning a fifth fire were excluded as it was too remote from the time of the February, 1975 fire. After the first "sanitized" question and answer the judge instructed the jury that a question answered with "No" or "I don't know" or "I don't remember" constituted no evidence of any facts contained in the question. The next day during his charge, the judge repeated that the facts contained in those particular questions were not evidence.

The defendants argue that it was error for the judge to allow this line of questioning,[16] and that it was also error for him to deny their motions for mistrials based thereon. They further argue that it was error for the judge to allow the prosecutor to read the dates in question from a sheet of paper held in his hand during cross-examination, supposedly as a "prop."

The prosecutor apparently had evidence from the fire department that fires had occurred at Koplow properties on the dates he mentioned. Therefore his use of a list of such dates was not in itself objectionable. Compare 6 J. Wigmore, Evidence § 1808, at 374-375 (Chadbourn rev. 1976). However, his questions implied two factual predicates, one, that fires had occurred on certain dates and the other, that calls had been placed to the Koplow home. He admittedly had no evidence to support the latter assertion. Cf. ABA Standards Relating to the Prosecution Function § 5.7(d) (Approved Draft 1971). It is questionable whether the prosecutor was using this series of questions merely as a device to test Mrs. Koplow's memory of telephone calls received at home in the evenings.

We believe that the prejudice, if any, to the defendant must be held to have been cured by the judge's instructions. *Commonwealth* v. *Stewart*, Mass. , - (1978).[1] It is normally assumed that such instructions are followed by jurors, absent any reason appearing in the record to sug-

---

[16] At the defendants' request, the cross-examination of Mrs. Koplow was admitted only in the case of Commonwealth *vs.* Martin Koplow.

[1] Mass. Adv. Sh. (1978) 1521, 1529-1530.

gest otherwise. *Commonwealth* v. *Brown*, Mass. , - (1978).[j] *Commonwealth* v. *Jones*, 373 Mass. 423, 426 (1977),[k] and cases cited. The judge promptly instructed the jury not to consider the questions as evidence, and repeated this caution with specific reference to the questions at issue during his charge to the jury. *Id.* We hold that there was no error in his denial of the motion for mistrial. See *Brown, supra*; *Jones, supra*. It is unnecessary to discuss further the defendants' contention that the judge failed to explain adequately that Mrs. Koplow's testimony did not apply to the cases of all three defendants.

4. *Jury instructions.*

The defendants claim that the judge failed to give adequate instructions to the jury as to whether they could consider the fact of Lincoln's plea bargaining with the Commonwealth in weighing his credibility. They assert that Lincoln's status as an accomplice, his plea bargaining, his admitted perjury in past cases, the fact that the defendants had threatened to sue him, and the importance of his testimony to the Commonwealth's case combine to require that more be given than a general instruction that the jury should consider the personal interest of any witness in the outcome of the case, in order to "focus the jury on the special factors attending the crucial issue of Lincoln's credibility." The defendants further assert that the judge confused the jury as to whether they could consider the fact of plea bargaining in assessing Lincoln's credibility by his admittedly accurate instruction, given in delineating what was evidence in the case, that "[e]vidence is not whether or not you agree that the Commonwealth was wise or prudent to plea-bargain with Lincoln for his testimony.

We find no merit in these contentions. There was no requirement for an instruction that accomplice testimony should receive any special scrutiny. *Commonwealth* v. *Watkins*, Mass. , - (1979),[l] and cases cited.

---

[j] Mass. Adv. Sh. (1978) 2266, 2278-2279.

[k] Mass. Adv. Sh. (1977) 2041, 2044.

[l] Mass. Adv. Sh. (1979) 487, 492-493.

The defendants were given wide latitude in cross-examining Lincoln extensively concerning his plea bargaining, his bias and prejudice, his past perjury and other admitted criminal acts, see *Commonwealth* v. *Graziano*, 368 Mass. 325, 329-330 (1975), and in their final arguments they placed great emphasis on these matters as bearing on Lincoln's credibility. "Ordinarily the jury can be expected to take full account of such matters without more" than a general instruction that they weigh the credibility of each witness and consider any interest the witness has in the outcome of the case. *United States* v. *DeVincent*, 546 F.2d 452, 456 (1st Cir. 1976), cert denied, 431 U.S. 903 (1977).

Early in his charge the judge drew the jury's attention to "the critical and crucial question" in the case, that being, "Did these defendants conspire together with Lincoln and agree with Lincoln to set fire to 50 Symphony Road?" He gave careful and lengthy instructions about the jurors' duty to determine the credibility of each of the witnesses, and to seek the truth by resolving the wide divergencies in the testimony. He instructed them to consider, in evaluating the credibility of each witness, the impact of any personal interest a witness may have in the outcome of the case. Without repeating his instructions, we hold that the judge fairly and accurately charged the jury. See *Commonwealth* v. *Little*, Mass. , (1978),[m] We do not think the judge's statement that the wisdom or prudence of the Commonwealth's plea-bargaining agreement with Lincoln did not constitute evidence, confused the jury or foreclosed their consideration of that agreement as it may have affected Lincoln's credibility. If anything it reemphasized the negative aspects of Lincoln's character which had been revealed during his direct and cross-examinations, and to which defense counsel had devoted much time and emphasis during their final arguments. There was no error.

Judgments affirmed.

---

[m] Mass. Adv. Sh. (1978) 2364, 2371.

Appendix D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAX J. ALLEN, PETITIONER *vs.* LINWOOD H. SNOW, SHERIFF OF PLYMOUTH COUNTY, MASSACHUSETTS, DEFENDANT	HABEAS CORPUS NO. 80-308-S

Motion for Evidentiary Hearing or Alternative Relief

Petitioner Max J. Allen moves that the Court determine, in accordance with Rule 8(a) [Rules governing § 2254 cases in the United States District Courts], that an evidentiary hearing be held in this case with respect to the issues raised in the first paragraph of the Amended Habeas Corpus Petition, and the Petitioner states, in support of this motion:

1. That the merits of the factual dispute were not resolved in the state court hearing;
2. That the fact-finding procedure employed by the state court was not adequate to afford a full hearing with respect to this issue;

3. That all of the material facts were not adequately developed at the state court hearing;
4. That the Petitioner did not receive a full and adequate hearing in the state court proceeding with respect to this issue; and that by action of the trial judge in the state court proceeding he was denied due process of law; and
5. That the factual determination made by the Supreme Judicial Court that trial counsel "voluntarily" ceased their investigation of jury veniremen is not fairly supported by the record.

In support of this motion, the defendant submits herewith:

a. A Memorandum;
b. An Affidavit of William A. Brown;

For alternative relief, the Petitioner requests that the Court consider and order expansion of the record by written interrogatories propounded to the state trial judge and the Petitioner's counsel at trial in the state proceeding.

Respectfully,
MAX J. ALLEN,
By his attorney,

s/ _____

Ronald F. Kehoe
Haussermann, Davison & Shattuck
One Boston Place
Boston, Massachusetts 02108
(617) 723-2920

Dated: March 31, 1980

CERTIFICATE OF SERVICE

I, Ronald F. Kehoe, hereby certify that on this date, I served the attached by delivering a copy to:

Paul W. Shaw, Esquire
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108

3/31/80
Date

s/ _____
Ronald F. Kehoe

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAX J. ALLEN, PETITIONER *vs.* LINWOOD H. SNOW, SHERIFF OF PLYMOUTH COUNTY, MASSACHUSETTS, DEFENDANT	HABEAS CORPUS No. 80-308-S

AFFIDAVIT OF WILLIAM A. BROWN

1. My name is William A. Brown. I practice law in Boston with the firm of Brown and Webster, Ten Post Office Square. I was trial counsel for Max J. Allen in the matter of *Commonwealth* v. *Allen et als*, Suffolk Superior Court Numbers 014445, 014446.

2. I am 37 years old and have practiced law since 1969, the year of my admission to the Massachusetts Bar. I am a graduate of Suffolk University Law School (1969), and Northeastern University (B.S. and M.S., Electrical Engineering).

3. I was a law clerk to the Honorable Frank J. Murray, United States District Judge, 1969-1970. From 1971 through 1978, I was an Assistant United States Attorney in Boston, handling criminal and civil litigation; from 1975 to 1978 I was chief of the Civil Division.

4. I have been engaged in the private practice of law with the firm now known as Brown and Webster since 1978. My practice consists of litigation, both criminal and civil.

5. The indictments were returned on October 13, 1977. From the time of arraignment until the summer of 1978, Mr. Allen was represented by other counsel. Mr. Allen asked me to represent him in August 1978, and thereafter I represented him continuously through trial. There was a single trial in the Suffolk Superior Court with respect to the indictments, and the defendant was tried with two co-defendants, Michael R. Cappiello and Martin Koplow. At trial, Mr. Koplow was represented by Albert L. Hutton, Jr. and Mr. Cappiello was represented by Richard A. Gargiulo, Esquire.

6. Prior to the trial of Mr. Allen, I had never tried a criminal defense case before Judge Dwyer.

7. Prior to Mr. Allen's trial in the Suffolk Superior Court, I was extremely concerned from the outset about the jury issues in this case. One of my initial concerns when I first entered the case was the amount of pretrial publicity which had apparently been engendered. The case was one of more than one hundred indictments against 34 persons (including the defendants Allen, Cappiello, and Koplow) which were returned by a Suffolk County Grand Jury concerning an alleged "arson ring" in the Boston area. All of these cases had been specially assigned to Judge Dwyer. They all involved the testimony of George Lincoln as the principal witness for the Commonwealth, and I knew that this would also be true in Mr. Allen's case. I consulted with counsel for the codefendant Cappiello, Mr. Gargiulo. Mr. Gargiulo had made a careful study of the results in the related cases which had gone to trial earlier, and I became convinced from the information which he made known to me that during the trial of the previous cases and the disposition of same there had been serious and substantial publicity which was of grave potential prejudice to Mr. Allen's forthcoming trial.

8. During the pretrial proceedings before I began to represent Mr. Allen, the judge had heard motions of the defendants Allen and Cappiello to dismiss the indictments on the ground of extensive pretrial publicity relating to the so-called "arson ring" of which these defendants were allegedly a part. The trial judge, after hearing on the motions to dismiss, had denied them in March 1978. In doing so, he filed findings of fact and rulings of law which noted the extent of the publicity and the fact that much of it had been intentionally generated by the office of the Attorney General. The trial judge had specifically stated that he would conduct an extensive voir dire examination of prospective jurors in order to insure against prejudice to the defendants.

9. I recall that on or about August 1, 1978 Judge Dwyer had ordered two special venires to be summoned for jury selection commencing on September 13, 1978.

10. On August 3, 1978, Attorney General Bellotti appeared on a nation-wide television program entitled "Arson: Fire for Hire." This program had as its focus arson in Boston, and was aired locally over Channel 5. It was also publicized in the *Boston Globe*. Because of this specific publicity, and also because of the continuing publicity in August 1978 concerning the trials of the related "arson ring" cases, Mr. Gargiulo and I consulted together as to what measures we could take to protect our clients against the serious prejudicial effect which we anticipated would result from the publicity. We determined to take two steps: (1) to file and press a renewed motion to dismiss the indictments; and (2) to retain investigators to go into the neighborhoods of the jury veniremen and to obtain whatever information they could on each venireman, so as to assist Mr. Gargiulo and myself in exercising challenges at the time of jury selection.

11. Mr. Gargiulo and I further agreed to divide the work between ourselves. I was to prepare the renewed motion to dis-

miss and to assemble the evidence of continuing publicity, perform the necessary legal research and write a supporting memorandum. Mr. Gargiulo was to hire and supervise the investigators. Our respective clients, Messrs. Allen and Cappiello, were consulted and agreed to this course of action. They further agreed to divide the expenses of the jury investigation, as did Mr. Hutton and his client, Mr. Koplow.

12. I have reviewed the partial transcript of the empanelment proceedings which, I am told, has been submitted to this Court. With particular reference to page 2-121, I recall the lobby conferences, and I recall, at this time, the occurrences which are reflected in that transcript.

13. When Judge Dwyer first asserted his view as to the impropriety of our action in conducting the jury investigation, I did not know if he was correct. I had focused on the renewed motion to dismiss and on preparing my client's case for trial. I had largely left the matter of the jury investigation up to Mr. Gargiulo, who was acting in that connection on behalf of all three defendants.

14. After the morning lobby conferences with Judge Dwyer, on September 14, 1978, as reflected in the partial transcript, Tr. 2-121, et seq., the three defense attorneys agreed among ourselves that Mr. Gargiulo should instruct the investigators to cease the investigation. I agreed to do so initially (before the lunch recess) because of Judge Dwyer's assertion that our conduct was unethical and his citing of an A.B.A. standard, which I understood the Court viewed as governing our conduct. I expected the point to be resolved after the lunch recess.

15. I also attended the lobby conference which took place after the noon recess. I heard Mr. Gargiulo's arguments that the defense investigation was legally proper and ethically permissible. I also heard Judge Dwyer's comments [Tr. 2-185, line 11: ". . .I don't accept your premises or precepts of

ethical standards, written or unwritten, that you're giving in this lobby conference. . . ."]. I heard the judge make the following statement, which I understood to be a threat to hold the defense attorneys in contempt of court for jury tampering or interfering with the trial [Tr. 2-189, lines 13-20]:

"THE COURT: I'm giving you no order now. I'm making no order for the record now. I'm making a judicial inquiry, under my authority to maintain the integrity of a jury that's about to hear a case. That's the very limitation I have right now, and until such time as my inquiry is completed, I will make no orders. When it is, I may not make any then. I may reserve them until the end of the trial."

16. Immediately after the judge made the foregoing remarks, I talked with Messrs. Gargiulo and Hutton. Based on the judge's comments, especially the reference to making orders at "the end of the trial," we agreed among ourselves not to resume the investigation because all three of us said we had the same understanding of the judge's intentions. One of us said, "If we keep that up, he's going to throw us in the can," or words to that effect. All three defense attorneys agreed among ourselves to discontinue the investigation, and we further agreed that we had protected our clients' rights as best we could by seeking a definitive ruling from Judge Dwyer, which he had refused over our objections and exceptions [Tr. 2-188, 189, 191].

17. I had then, and have now, no doubt in my mind that we were effectively ordered to stop the investigation, and that we would receive some sanction in this regard if we persisted. I believe that if I had continued, I would go to jail. I was also fully mindful that this trial judge had commenced the trial, and that in the event of conviction, this very same judge would be imposing sentence on my client.

William A. Brown

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL R. CAPPIELLO, PETITIONER	:	
v.	:	CIVIL ACTION NO. 80-312-S
THE ASSOCIATE JUSTICES OF THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS AND FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANTS	:	

AFFIDAVIT OF RICHARD A. GARGIULO

1. My name is Richard A. Gargiulo. I practice law in Boston with the firm of Gargiulo & McMenimen, One Court Street, and I was counsel for Michael R. Cappiello in the matter of *Commonwealth* v. *Cappiello*, Supreme Judicial Court Number 1841, and Suffolk Superior Court Number 014445.

2. I am 41 years old and have practiced law since 1968, my year of admission to the Massachusetts Bar. I am a graduate of Suffolk Law School (1968), and the University of Maryland (B.S., Chemistry, 1961). After college and before law school, I was with the United States Army, Infantry.

3. I was an Assistant District Attorney for Middlesex County, and then First Assistant District Attorney for Middlesex

County between 1968 and 1973. From 1973 to 1976, I was an associate with the Boston law firm of Sisson & Sarrouf.

4. I began my current arrangement for private practice in 1976, and I practice law full-time from this one Boston office only. Of my practice, 90 per cent is litigation, and of the 90 per cent litigation, I would estimate that 70 per cent is criminal litigation.

5. I was asked by Mr. Cappiello to represent him shortly after his arraignment, and I represented him continuously through trial, the Massachusetts Appeals Court, and the Supreme Judicial Court for the Commonwealth. There was a single trial in the Suffolk Superior Court with respect to the indictments, and the defendant was tried with two co-defendants, Max J. Allen and Martin Koplow. At trial, Mr. Koplow was represented by Albert L. Hutton, Jr.; at trial, Mr. Allen was represented by William Brown, Esquire.

6. Prior to the trial of Mr. Cappiello, I had never tried a criminal defense case before Judge Dwyer although my recollection is that in 1970 and 1971 I tried in excess of three cases before Judge Dwyer, while I was a prosecutor. I have no specific recollection of any one particular case.

7. Prior to Mr. Cappiello's trial in the Suffolk Superior Court, I spent an extraordinary amount of time studying the jury issues in this particular case. One of my initial concerns when I first entered the case was the amount of pretrial publicity which the cases had apparently engendered. The case was one of several indictments which appear to have been returned by a Suffolk County Grand Jury concerning arson in the Boston area. All of these cases had been specially assigned to Judge Dwyer, and prior to the trial of Mr. Cappiello I made a careful study of the results in previous cases, and I remain convinced that during the trial of the previous cases and the disposition of those cases there was serious and substantial publicity with respect to these cases which was of grave potential prejudice to Mr. Cappiello's trial.

8. During the course of pretrial proceedings in the state system, the judge heard motions with respect to the alleged extensive pretrial publicity relating to a so-called "arson ring" of which defendant Cappiello was allegedly a part. The trial judge, after hearing on the motions, denied them and in so doing filed findings and rulings which noted the extent of the publicity and the fact that much of it had been intentionally generated by the office of the Attorney General. The trial judge further specified that he would conduct an extensive voir dire examination to insure against prejudice to the defendants. [See *Commonwealth* v. *Allen, et al.*, S.J.C. No. 1841, Slip Op. 5-6.]

9. I recall and aver that the trial judge ordered a special venire and at this time, and after considering all of the factors that I have mentioned in this Affidavit, I determined to obtain as much background information on the members of the special venire as was practically possible. I made various motions in this regard, and there was a hearing held with the Court and the Jury Pool Commissioner for Suffolk County which resulted, in my opinion, and I aver, very little useful information.

10. During this same period of time I had been undertaking my own private study with respect to jury selection in criminal trials, and was personally familiar with a treatise known as "Jury Selection In Criminal Trials" by Ann Fagan Ginger, published in 1975 by Lawpres. After study, I determined that the publicity in this case was extremely out of the ordinary.

11. I contacted a retired police officer, one Raymond Morgan, who was previously known to me and had been known to me for several years as a man of good reputation and fine ability. My client agreed with my suggestion and directed me to proceed with an investigation of the persons listed on the special venire. At my client's direction I retained Mr. Morgan with a staff of five persons, coordinated by Mr. Morgan and

myself, to divide the special venire list into special geographical sections, then to divide the work of making inquiry and observation for factors to be utilized in exercising challenges during the course of jury selection.

12. The process followed with respect to this plan would be to send a staff person into the community who would make investigation, then telephone his information to Mr. Morgan who would in turn relay the information to me in the courtroom every half hour or so. Prior to commencement of jury selection, we had information on approximately 15 to 20 jurors and my belief is that the list of persons has been appended to the record of the state action in this case.

13. After consultation with my client, but prior to the commencement of jury selection, I advised co-counsel of these actions, with the request that co-defendants share in the cost of the investigation, and the cost was shared, accordingly.

14. I have reviewed the partial transcript prepared by Mr. Kehoe, simultaneously submitted, I am told, with my affidavit, and with particular reference to page 2-121, I recall the lobby conferences, and I recall, at this time, the occurrences which are reflected in that transcript.

15. When Judge Dwyer first asserted his view as to the impropriety of my action in conducting the jury investigation, I did not know if he was correct, and I had read the Massachusetts statute concerning jury selection, and the one case that I could find, and the disciplinary rule that I felt was applicable to the situation. However, I did not have the statute, the case or the disciplinary rule with me in the courtroom or the court lobby at that time.

16. After the lobby conferences with Judge Dwyer, on September 14, 1978, as reflected in the [Kehoe] transcript, Tr. 2-121, et seq., I did, at approximately 12:10 P.M., inform and direct Mr. Morgan to cease any investigation of the jurors and I did so because of Judge Dwyer's conclusion and assertion

of unethical conduct and his citing of an A.B.A. standard, with my understanding that the Court was of the view that the standard governed my conduct.

17. At the noon recess on September 14, 1978, I went to the library, and determined, in my opinion, that the citation of the A.B.A. standard was not Massachusetts law, nor ever adopted by the American Bar Association, and that the standard was, in effect, simply a reporter's note. After the noon recess, in conference with the trial judge, I brought the case and the rule and previous practice by the Chief Judge of the Massachusetts Superior Court to the attention of the trial judge. However, it was my understanding, that by the trial judge's language (Tr. 2-185, line 11: ". . .I don't accept your premises or precepts of ethical standards, written or unwritten, that you're giving in this lobby conference. . . ."] that I was dealing in an area of little law, in which the judge clearly disagreed, and I believe, after hearing every word of the judge, that the judge was establishing a record to hold me in contempt for jury tampering and for interfering with the trial in a way prohibited by ethical standards and Massachusetts statutory law. I felt intimidated and threatened. I construed the judge's action as expressing far beyond extreme displeasure and then believed that it would be improper for me to go further without a definitive ruling, and upon this basis I pressed for a definitive ruling by the Court.

18. I had then, and have now, no doubt in my mind that I was effectively ordered to stop the investigation, and that I, as initiator of the jury investigation program, would receive some sanction in this regard. I believe that if I continued, I would go to jail and I was fully mindful that this trial judge had commenced the trial, and that in the event of conviction, that this very same judge would be attending to the sentencing of my client.

s/ _____

Richard A. Gargiulo

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARTIN KOPLOW PETITIONER	
v.	HABEAS CORPUS NO. 80-316-S
LINWOOD H. SNOW, SHERIFF, PLYMOUTH COUNTY RESPONDENT	

AFFIDAVIT OF ALBERT L. HUTTON, JR.

I, Albert L. Hutton, Jr., on oath, say that I was retained to and did represent the above named petitioner, Martin Koplow, in the State criminal proceedings which resulted in his conviction and preent allegedly illegal confinement in the Plymouth County House of Correction in the custody of the above-named respondent Sheriff Linwood H. Snow. I also represented the said petitioner in his appeal to the Massachusetts Supreme Judicial Court which sustained his conviction.

At the commencement of the state trial I was informed by Attorney Richard Gargiulo, who represented Michael R. Cappiello, another defendant in the same proceedings, that he and Attorney William Brown, who represented the third defendant Max J. Allen, had engaged an investigator with a staff of five persons to investigate the prospective jurors so as to pro-

vide counsel with more information so as to more intelligently exercise his peremptory challenges.

The case had involved an alleged conspiracy to commit arson and conspiracy to defraud an insurer. It, along with other similar cases, had received wide publicity the county from which the jurors were to be selected. I felt that the atmosphere in the community was such that although the trial judge had promised an extensive jury voir dire, I needed a better informed basis upon which to exercise peremptory challenges in guarding against the selection of a jury possibly prejudiced by the aforementioned pre-trial publicity.

On my advice the petitioner contributed his one-third share of the cases of such investigation and all defendants commenced to receive cards from such investigators which contained information based on their investigation which, in my opinion, was extremely helpful to the defendants and their respective counsel in the decisional process attending the peremptory challenging of these jurors and in turn the ultimate selection of the jury.

Part way through the jury selection process the fact that an investigation of prospective jurors was being conducted by the defense, which included interviewing neighbors of prospective jurors, was called to the attention of the trial judge by the prosecution. In extremely angry tones the trial judge informed counsel that he thought their conduct in this regard was improper and unethical. I construed this as a definite order to stop such investigation immediately. I thereupon informed Mr. Gargiulo to tell the investigator to cease such investigation immediately, which he did. I could only construe the judge's position as an order to stop the investigation immediately. I was also left with the very strong impression that the trial judge contemplated contempt proceedings against me and the other attorneys after the trial was over.

Although the judge never used specific language in ordering a cessation of the aforesaid investigation, there was no doubt in my mind that that was the message he intended to convey when he told me and the other attorneys that we were unethical in having the said investigation conducted. At a later time, after the investigators had been recalled and disbanded, I endeavored for the sake of assuring that my client's position was perfectly clear in the record on this point, to cause the trial judge to put his order in more specific terms in order that there would be no question at the appellate level that we had stopped the investigation on his order. He declined so to do.

It is my honest opinion, for whatever it is worth in this proceeding, that the trial judge's reluctance to make his earlier position clear in the record by inserting a specific order, was based upon the probability that he had been in the meantime, enlightened as to the fact that the provision of the proposed ABA standards for prosecutors and defense counsel which dealt with juror investigation, upon which the said trial judge had relied in making his earlier comment as to the unethical conduct of defense counsel, i.e., interviewing neighbors of prospective jurors, was in fact never finally adopted as part of the standard.

NO. 80-1447

MAR 31 1981
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

MAX J. ALLEN,
Petitioner,

v.

LINWOOD H. SNOW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FRANCIS X. BELLOTTI
Attorney General

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Section

PAUL W. SHAW
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
Telephone: (617)727-2240

I.

QUESTIONS PRESENTED

1. Whether the inquiry by the state trial judge into the pretrial investigation of prospective jurors being conducted by defense counsel raises any constitutional issue cognizable upon collateral review.

2. Whether the alleged improper cross-examination of an alibi witness not called by the petitioner presents a constitutional claim cognizable upon collateral review.

3. Whether alleged error in certain portions of the final instructions to the jury in petitioner's state court trial raises a constitutional claim cognizable upon collateral review.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....I

STATEMENT OF FACTS.....2

REASONS FOR DENYING THE WRIT.....8

I. THE PETITIONER HAS FAILED TO ESTABLISH THAT HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.....8

THE RECORD IS NOT SUFFICIENT FOR SUPREME COURT REVIEW.....13

II. THE PROPRIETY OF THE CROSS-EXAMINATION OF THE ALIBI WITNESS PRESENTS NO ISSUE OF CONSTITUTIONAL MAGNITUDE TO THE PETITIONER.....16

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND DECISIONS OF OTHER CIRCUITS.....19

III. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT CONCERNING COLLATERAL REVIEW OF FINAL INSTRUCTIONS TO A JURY.....23

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND DECISIONS OF OTHER CIRCUITS AND STATE COURTS.....26

CONCLUSION.....28

TABLE OF AUTHORITIES

Aldridge v. United States,
283 U.S. 308 (1931).....10

Cupp v. Naughten,
414 U.S. 141 (1973).....23

Donnelly v. DeChristoforo,
416 U.S. 637 (1974).....17

Geders v. United States,
425 U.S. 80 (1976).....10,11

Grieco v. Meachum,
533 F. 2d 713 (1st Cir.),
cert. denied, 429 U.S. 858 (1976).....25

Henderson v. Kibbe,
431 U.S. 145 (1977).....24

Holloway v. Arkansas,
435 U.S. 475 (1978).....11

Ketchum v. Ward,
422 F. Supp. 934, 944-947
(W.D.N.Y. 1976), aff'd,
556 F. 2d 557 (2nd Cir. 1977).....21

Lisenba v. California,
314 U.S. 219 (1941).....16

Salemme v. Ristaino,
587 F.2d 81
(1st Cir. 1978).....16,17

Miller v. Pate,
386 U.S. 1 (1967).....20

Mooney v. Holohan,
294 U.S. 103 (1934).....21

Napue v. Illinois,
360 U.S. 264 (1959).....20

Ristaino v. Ross,
424 U.S. 589 (1976).....10

Sandstrom v. Montana,
442 U.S. 510 (1979).....25

Straus v. United States,
376 F. 2d 416 (5th Cir. 1967).....26

United States ex rel Cannon v. Moroney,
255 F. Supp. 235 (W.D. Pa. 1966)
aff'd, 373 F.2d 908 (3rd Cir. 1967)...22

United States v. Barnes,
604 F.2d 121 (2nd Cir. 1979),
cert. denied, 446 U.S. 907 (1980)..10,13

United States v. Blevins,
555 F. 2d 1236
(5th Cir. 1977), cert. denied,
434 U.S. 1016 (1978).....19

United States v. Davis,
546 F. 2d 617
(5th Cir. 1977).....18

United States v. Duklewski,
567 F.2d 255 (4th Cir. 1977).....12

United States v. Hyatt,
565 F. 2d 229 (2nd Cir. 1977).....22

Wilhelmi v. Beto,
426 F.2d 795 (5th Cir. 1970).....17

Zemina v. Solem,
438 F. Supp. 455 (D. S.D. 1977),
aff'd 573 F. 2d 1027 (8th Cir. 1978)..26

NO. 80-1447

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

MAX J. ALLEN,
Petitioner,

v.

LINWOOD H. SNOW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent Linwood H. Snow respectfully asks that the petition for a writ of certiorari be denied.

Respondent accepts petitioner's statement of jurisdiction, citation of opinions below and statement of the proceedings in the courts below.

STATEMENT OF FACTS

With respect to the facts cited by the petitioner pertaining to the issues which he seeks to raise in this Court, while the respondent is not dissatisfied with that recitation, it is believed that the following additional facts are necessary for an understanding of the issues involved.

The Pretrial Investigation of Prospective Jurors

At no time prior to the jury selection proceedings did defense counsel bring to the attention of the trial judge the fact that they were conducting any type of investigation into the background of the

jurors. During the second day of empanelment, the prosecutor informed the trial judge at a bench conference that the petitioner and his co-defendants were conducting this type of investigation, and that it included personal interviews of the veniremen's neighbors. (2 Tr. 121).

At the time these facts were brought to the attention of the court, defense counsel acknowledged that they had hired investigators to examine the neighborhoods of the veniremen, but stated that the personal interviews which were conducted of the neighbors were done without their authority and without their control. (2 Tr. 121, 123-124, 182-183).

It was against this factual setting that the trial court made certain remarks which form the basis for petitioner's claim of error. The court expressly stated that

defense counsel were "certainly entitled" to conduct neighborhood inspections (2 Tr. 123). The court's sole concern was with the propriety of the neighbor interviews. The court was concerned that if the jurors found out about the interviews, it could have an inhibiting effect on their ability to serve impartially. (2 Tr. 123-124).

There followed a series of bench conferences with counsel concerning the propriety of conducting interviews with veniremen's neighbors while the empanelment continued. At none of these bench conferences did the court order the defense counsel to terminate their investigation of the prospective jurors. Later that same day, defense counsel informed the court that they had ordered the private detectives to cease their investigation (2 Tr. 143-145). It was not until the next

day that any of the defense counsel objected to the remarks made by the trial court regarding the propriety of these interviews (2 Tr. 384).

THE CROSS-EXAMINATION OF THE WITNESS ROSE KOPLOW

The witness Rose Koplow was called as an alibi witness by the petitioner's co-defendant, Martin Koplow. She simply testified on direct examination that on a particular evening in February, 1975, she had been at home with her husband at the time a fire was set in the building in question (10 Tr. 93-94).

On cross-examination, the prosecutor only asked Mrs. Koplow about her location and the receipt of telephone calls with respect to a fire on four other specific dates. After being asked if she recalled where she was on those dates, she was

simply asked "whether or not" she had received a telephone call with respect to a fire (10 Tr. 10-3-104, 108-109, 110-111, 115-116). To each of these questions, the witness Rose Koplow replied that she did not recall. At no time was she asked any questions about the petitioner or his association with the co-defendant Martin Koplow. Furthermore, the jury was instructed after her testimony that none of her testimony was to be applied in the petitioner's case (10 Tr. 114-115).

During the cross-examination, the trial court immediately instructed the jury after the first question was asked by the prosecutor:

> No facts contained in any question that's answered "I don't remember" or "I don't know" or "No" is any evidence whatsoever of the facts contained in the question. (10 Tr. 104).

Not only did the court instruct the jury forcefully during the cross-examination itself, but it also instructed them at length on this issue during the final charge.

> Any question which was asked during the course of the trial where the witness says, " do not know" or "No", or "I do not remember," then the facts contained in such question are, of course, not evidence. This applies especially to the series of answers given by Mrs. Koplow to a series of questions put to her by Commonwealth's counsel regarding a series of telephone calls. Her answer was "I do not remember," "I do not know." So none or the facts contained in those questions are evidence. (11 Tr. 15-16)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE PETITIONER HAS FAILED TO ESTABLISH THAT HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

Neither the Massachusetts Supreme Judicial Court, the District Court nor the Court of Appeals reached the constitutional issue of whether the petitioner was denied the effective assistance of counsel by the action of the trial court in connection with the pre-trial investigation of the veniremen. Indeed, in each court the petitioner principally argued that the action of the trial court denied him the right to an impartial jury. Each reviewing court, upon a full examination of the record, concluded that defense counsel had voluntarily abandoned the investigation and that the trial court's actions were not

responsible for the termination. Petitioner is now attempting to insinuate new facts and issues into the record to have this Court decide an issue that does not reach constitutional dimensions. The petitioner would have this Court articulate a standard for evaluating whether trial counsel has been impermissably deterred from taking legitimate action on behalf of his client. However, he has not in the first instance established that any constitutional right was violated by any action of the state trial court.

Although petitioner argues that the case involves the right to the effective assistance of counsel, the main thrust of petitioner's argument falls unless he can establish he had some constitutional right to have trial counsel engage in a pre-trial investigation of prospective jurors.

Unless this right is established, it can not be said that the action of the trial court deprived petitioner of the effective assistance of counsel.

It is clear that a trial judge has extensive control over the conduct of jury empanelment. See, e.g., Ristaino v. Ross, 424 U.S. 589, 594-595 (1976); Aldridge v. United States, 283 U.S. 308, 310 (1931). To this end, "the judge is not a mere moderator, but is governor of the trial for the purpose of assuring its proper conduct. . . ." Geders v. United States, 425 U.S. 80, 86 (1976). During the empanelment process, a trial judge may permissably curtail any pretrial investigation where such conduct could affect the jury. United States v. Barnes, 604 F.2d 121 (2nd Cir. 1979), cert. denied, 446 U.S. 907 (1980).

None of the cases cited by the petitioner lend support to his novel assertion that trial counsel have an unfettered right to conduct a pre-trial investigation of prospective jurors free from control by the trial judge. While each case involves the right to effective assistance of counsel, they are all distinguishable on the facts. Geders v. United States, 425 U.S. 80 (1976), involved a sequestration order which prevented defense counsel from consulting with the defendant during an overnight recess in the trial. In Holloway v. Arkansas, 435 U.S. 475 (1978), the Court held that three co-defendants had the right to separate trial counsel due to the substantial risk of a conflict of interest. Forcing the defendants to go to trial represented by one attorney in the face of such a

substantial risk denied them the effective assistance of counsel. Finally, in United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977), the defense attorney was forced by the trial court to withdraw his appearance for the defendant in light of an unspecified conflict of interest. The narrow issue presented to the court of appeals was whether this action denied the defendant the right to counsel of his choice, where the trial court did not give the defendant an opportunity to express his opinion on the matter.

Even assuming that petitioner's trial counsel was "subjectively" intimidated by the trial judge to terminate the pre-trial investigation entirely, which none of the courts below found on the record, the petitioner has still not established a constitutional violation. While the

petitioner attempts to couch the issue presented as being one of effective assistance of counsel, it is submitted that any right of counsel to conduct a pre-trial investigation is not an end in itself, but simply a means of acquiring information to intelligently exercise peremptory challenges. The petitioner has made no showing that his trial counsel was impaired or "chilled" in any way in intelligently exercising peremptory challenges on his behalf or otherwise how he was deprived of the effective assistance of counsel during the jury selection process. See United States v. Barnes, supra, at 143.

THE RECORD IS NOT SUFFICIENT FOR SUPREME COURT REVIEW

Even assuming that the petitioner had some right to an unfettered pre-trial

investigation which was impaired by the trial court, review in the instant case would not be prudent. At no time prior to the filing of a petition for writ of habeas corpus in the federal district court did the petitioner allege that his trial counsel was subjectively intimidated by the trial judge into terminating the jury investigation. The first time the subjective motivation of trial counsel was raised was through an affidavit filed in the district court in support of an evidentiary hearing. At that time, the respondent moved to dismiss the petition on the ground that the issue of subjective motivation had never been presented to the state court for review. The District Court dismissed the petition and denied the motion for an evidentiary hearing, ruling that even if subjective intimidation of

counsel were established it would not result in the grant of the writ. The Court of Appeals affirmed the district court's dismissal, holding that the issue of termination of the investigation should be determined on the basis of what the record disclosed and not with what trial counsel may choose to say about what their subjective intent was after the trial.

As a result, this Court does not have any findings of fact as to the subjective motivation of petitioner's trial counsel in terminating the investigation. All that appears is an affidavit of the trial attorney which was never open to the respondent to dispute. On this slim record, where no court made any determination of the actual subjective intent of petitioner's trial attorney, it would be unwise for the Supreme Court to

build constitutional principles on such a weak foundation. This Court would be forced into the position of speculating on the rationale of the defense attorney in terminating the investigation. Speculation is simply not a prudent basis for Supreme Court review.

II. THE PROPRIETY OF THE CROSS-EXAMINATION OF THE ALIBI WITNESS PRESENTS NO ISSUE OF CONSTITUTIONAL MAGNITUDE TO THE PETITIONER.

Habeas corpus relief is generally unavailable to state court prisoners solely on the basis of alleged errors in evidentiary rulings. Lisenba v. California, 314 U.S. 219, 228 (1941); Salemme v. Ristaino, 587 F.2d 81, 85-86 (1st Cir. 1978). Evidentiary rulings, even when found to be in violation of state law, rise to the level of constitutional

violations only when they are so fundamentally unfair as to constitute a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Furthermore, improper cross-examination has rarely been held to raise a federal constitutional claim. See Wilhelmi v. Beto, 426 F.2d 795, 796 (5th Cir. 1970). To rise to constitutional magnitude, the error must "so infuse the trial with inflammatory prejudice as to render a fair trial impossible." Salemme, supra at 85.

In the instant case, the petitioner has failed to demonstrate how his constitutional rights were violated by the alleged improper cross-examination of the alibi witness. This alibi witness was called by a co-defendant (Martin Koplow) to demonstrate that Koplow was at home at the time he (Koplow) had allegedly set fire to

the property at issue. Upon cross-examination by the prosecutor, the witness was asked a series of questions which could be found to relate fires on other properties of the co-defendant Koplow.

No rights of the petitioner were impacted by this cross-examination; indeed, the jury was specifically instructed that none of the alibi witness' testimony applied to the petitioner's case. Furthermore, there was no evidence that the petitioner was associated in any other properties with the co-defendant Koplow. As a result, the petitioner has failed to demonstrate how the jury could have drawn any adverse inferences against him from these questions. See United States v. Davis, 546 F. 2d 617, 620-621 (5th Cir. 1977).

In addition, the alleged error does not rise to constitutional dimensions. Misconduct on the part of the prosecutor to warrant relief must be so prounounced and persistent that it permeates the entire atmosphere of the trial. United States v. Blevins, 555 F. 2d 1236, 1239-1240 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978). In the instant case, the court below carefully scrutinized the effect the questioning may have had on the jury and concluded that the total effect of this one isolated episode in the context of an eleven day trial was not unconstitutionally unfair.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND DECISIONS OF OTHER CIRCUITS

The petitioner claims that the decision by the Court of Appeals is in conflict with the decisions of this Court and other

federal courts relating to prosecutorial misconduct. However, all of the cases relied upon by the petitioner to demonstrate this conflict are inapposite to the issue involved in the instant case; the alleged improper questioning of an alibi witness. All of the cases cited by the petitioner involve the intentional use of false or misleading evidence as part of the prosecution's case in chief.

Miller v. Pate, 386 U.S. 1 (1967), involved a rape-murder trial where the prosecution introduced a pair of defendant's underwear shorts into evidence. These shorts contained stains which were identified by the prosecution as blood of the victim when it was known that the stains were not blood but paint. In Napue v. Illinois, 360 U.S. 264 (1959), the prosecution in a murder trial allowed an

accomplice to falsely testify that he had received no promise of consideration in return for his testimony and did nothing to correct the witness' false testimony. Mooney v. Holohan, 294 U.S. 103 (1934), involved particularly egregious conduct by the prosecutor in knowingly using perjured testimony to convict the defendant.

The petitioner himself concedes that the conduct of the prosecutor in the instant case did not reach the level of misconduct in any of the lower federal court cases he cites on the issue of prosecutorial overreaching. Indeed, the situation is more analogous to the cases of Ketchum v. Ward, 422 F. Supp. 934, 944-947 (W.D.N.Y. 1976), aff'd, 556 F. 2d 557 (2nd Cir. 1977) (improper cross-examination of defense witness did not raise a

constitutional claim) and United States ex rel Cannon v. Moroney, 255 F. Supp. 235, 237 (W.D. Pa. 1966), aff'd, 373 F.2d 908 (3rd Cir. 1967), (improper cross-examination of defendant concerning other crimes did not prevent him from receiving a fair trial). See also United States v. Hyatt, 565 F. 2d 229, 233 (2nd Cir. 1977).

The instant case was not one involving repeated prosecutorial improprieties; rather, the petitioner has extracted only one isolated instance of alleged prosecutorial overreaching in the form of improper questioning of an alibi witness not called by the petitioner during an extended trial. It is clear that none of the cases cited by the petitioner stands for the proposition that an isolated incident of prosecutorial misconduct,

without more, is a violation of the Due Process Clause of the Fourteenth Amendment. Consequently, the decision of the Court of Appeals in petitioner's case is not contrary to precedent of this or other federal courts.

III. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT CONCERNING COLLATERAL REVIEW OF FINAL INSTRUCTIONS TO A JURY.

The Court below, consistent with this Court's admonition in Cupp v. Naughten, 414 U.S. 141, 145-146 (1973), applied a rigorous standard in determining whether the alleged errors in the instructions were constitutionally infirm. The test is consistent with this Court's more recent pronouncement:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

The Court below properly examined the challenged aspects of the charge in the context of the overall charge and concluded that the state trial judge did not remove the fact of the principal accomplice's plea bargain from the jury's consideration in evaluating the credibility of his testimony. Indeed, the petitioner is simply arguing that the conclusion reached by the Court below was erroneous, not that it applied an incorrect standard.

As to the specific errors alleged, none rise to the level of constitutional error when viewed in the context of what is constitutionally required. First, there is no constitutional right to an "accomplice charge." Grieco v. Meachum, 533 F. 2d 713, 720-721 (1st Cir.), cert. denied, 429 U.S. 858 (1976). Second, petitioner has not claimed that any single instruction was an incorrect statement of law; he argues that the "synergistic effect" of certain portions of the charge misled the jury. The petitioner's reliance on Sandstrom v. Montana, 442 U.S. 510 (1979), as authority for his position is misplaced. At issue in Sandstrom was a charge that included a presumption which the Court found the jury may have concluded as being conclusive or as shifting the burden of persuasion to the defendant. No such allegation is made by

the petitioner in the instant case. He has taken one isolated portion of the extended charge, a portion which is conceeded to be a correct interpretation of law, and attempts to make it of constitutional magnitude.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND DECISIONS OF OTHER CIRCUITS AND STATE COURTS.

The petitioner has not alleged any conflict between the decision of the court below with the decision of any federal court which he cites.

In Straus v. United States, 376 F. 2d 416 (5th Cir. 1967), at issue was the refusal of the trial court to give instructions relating to a theory of defense for which there was a foundation in evidence. Similiarly, in Zemina v. Solem, 438 F. Supp. 455 (D. S.D. 1977), aff'd 573 F. 2d 1027 (8th Cir. 1978), the court

granted habeas corpus relief for the failure of the state court to give instructions on excusable or justifiable homicide and self-defense which had a basis in evidence.

None of the cases cited by the petitioner involved instructions regarding credibility of witnesses or accomplices. As a result, the petitioner is merely seeking review of isolated portions of extensive instructions regarding credibility which are not constitutionally infirm.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division

BY: Paul W. Shaw
PAUL W. SHAW
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, MA 02108
(617) 727-2240